88-1123

Supreme Court, U.S.
FILED
DEC 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LANDERS SEED CO., INC.,
Petitioner,

vs.

CHAMPAIGN NATIONAL BANK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FOR THE FOURTH JUDICIAL DISTRICT

JOHN H. BISBEE*
Law Offices Of John H. Bisbee
437 North Lafayette Street
Macomb, Illinois 61455
(309) 833-1797

Attorney for Petitioner

*Counsel of Record

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

248 pp

QUESTION PRESENTED

Does the Fourteenth Amendment Due Process Clause permit a state appellate court, deciding a civil appeal as a matter of right, to reverse a jury verdict awarding a litigant damages on its breach of contract claim on grounds neither preserved at trial nor presented on appeal thereby precluding litigant notice and an opportunity to be heard?

PARTIES IN THE COURT BELOW

Petitioner Landers Seed Co. was the Defendant-Appellant-Cross-Appellee in the court below. Respondent Champaign National Bank was the Plaintiff-Appellee-Cross-Appellant below.

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Constitutional, Statutory and Other Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Decision Below Was Reached in Conflict With the Fundamental Due Process Principle of Notice and Opportunity for Hearing Established by This Court's Precedents	7
II. The Decision Below Was Reached Contrary to the Fundamental Due Process Principle of Notice and Opportunity for Hearing Established by This Court As Applicable to Criminal Appeals of Right; To The Extent That Principle Does Not Apply to Civil Appeals of Right, This Court Should Make it Applicable	14
Conclusion	23
Appendix A	1a
Appendix B	12a
Appendix C	14a
Appendix D	15a
Appendix E	17a
Appendix F	18a

Appendix G 19a
Appendix H 22a
Appendix I 24a
Appendix J 29a
Appendix K 45a
Appendix L 60a
Appendix LL 66a
Appendix M 74a
Appendix N 75a
Appendix O 82a
Appendix P 86a
Appendix Q 88a
Appendix R 89a
Appendix S 107a
Appendix T 122a
Appendix U 162a
Appendix V 163a
Appendix W 212a

TABLE OF AUTHORITIES

Page

Cases:

Anders v. California, 386 U.S. 738 (1967) 22

Baldwin v. Hale, 1 Wall 223 (1864) 13

Board of Regents v. Roth, 408 U.S. 564 (1972) 15

Boddie v. Connecticut, 401 U.S. 371 8,12,13,14,23

Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 287 (1974) 18,22

Champaign National Bank v. Landers Seed Co., 165 Ill.App.3d 1090 (1988) .....*passim*

Chicago, Milwaukee, and St. Paul RY. Co. v. Polt, 232 U.S. 165 20

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 20,21

Cole v. Arkansas, 333 U.S. 196 (1948) 15,18,19

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 23

Duncan v. Louisiana, 391 U.S. 145 (1968) 15

Evitts v. Lucey, 469 U.S. 387 (1985) 14,16,23

FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968) 19

Franks v. North Shore Farms, Inc., 115 Ill.App.2d 57 (1st Dist. 1969) 9

Fuentes v. Shevin, 407 U.S. 67 (1972) 12,20

Garcia v. Murphy Pacific Marine Salvaging Co., 476 F.2d 303 (5th Cir. 1973) 20

Gardner v. California, 393 U.S. 367 (1969) 16

Griffin v. Illinois, 351 U.S. 12 (1956) 16,23

Helvering v. Gowran, 302 U.S. 238 (1937) 18,20,22

Home Insurance Co. v. Tyda!, 157 F.2d 851 (5th Cir. 1946) 20

Hovey v. Elliot, 167 U.S. 409 (1897) 13

Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) 22

In Re Gault, 387 U.S. 1 (1967) 10

Konigsberg v. State Bar, 353 U.S. 252 (1957) 18

Lane v. Brown, 372 U.S. 477 (1963) 16

Lindsey v. Normet, 405 U.S. 56 (1972) 12,16,21

Logan v. Zimmerman Brush, 455 U.S. 422 7

Long v. District Court of Iowa, 385 U.S. 192 (1966) 16

Manders v. Pulice, 44 Ill.2d 511, 256 N.Ed.2d 330 (1970) 4

Marotta v. General Motors Corp., 108 Ill.2d 168 (1985). 4

Martinez v. California, 444 U.S. 277 (1980) 7

Massachusetts Mutual Life Insurance Company v. Ludwig, 426 U.S. 479 (1976) 18

Matthews v. Eldridge, 424 U.S. 319..... 21

Meachum v. Fano, 427 U.S. 215 (1976) 22

Minneapolis and St. Louis R. Co. v. Bombolis, 241 U.S. 2121 (1916) 15

Moore v. Jewel Tea Co., 46 Ill.2d 288, 263 N.Ed.2d 103 (1970) 4

Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937) 17,20

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) 7,8,11,12,13,22

NLRB v. International Van Lines, 409 U.S. 48 (1972) .. 18

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1937) 20

Pedrick v. Peoria and Eastern RR Co., 37 Ill.2d 494 (1967) 11

Pennsylvania v. Finley, 481 U.S. ____, 95 L.Ed.2d 539 (1987) 22

Pennzoil Oil Co. v. Texaco, Inc., 481 U.S. ____, 95 L.Ed.2d 109 (1987) 16

Penson v. Ohio, ____ U.S. ____, No. 87-6616, (November 29, 1988) 15

Perry v. Sinderman, 408 U.S. 593 (1972) 7

Presnell v. Georgia, 439 U.S. 14 (1978) 15

Rondeau v. Mosinee Paper Corp., 422 U.S. (1975) 18

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 23

Ross v. Moffitt, 417 U.S. 600 (1974) 22

Smith v. Bennett, 365 U.S. 708 (1961) 16

Societe Internationale v. Rogers, 357 U.S. 197 (1958) ... 7

Spevack v. Klein, 385 U.S. 511 (1967) 19

Sprague v. Goodrich, 376 Ill.80, 32 N.Ed.2d 897 (1941). 9

Stern v. Nix, 480 F.2d 208 (3d Cir. 1988) 23

Stewart v. Huff, 14 Ill.App.3d 782, 303 N.E.2d 641 (1st Dist. 1973) 4

Swarb v. Lennox, 405 U.S. 191 (1972) 18

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. ____, 99 L.Ed.2d 565 (1988) .....*passim*

United States v. American Railway Express Co., 265 U.S. 425 (1924) 16,17,18,20,21

United States v. Cronic, 466 U.S. 648 (1984) 14,21

United States v. ITT Continental Banking Co., 420 U.S. 223 (1975) 18

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 18

Vitek v. Jones, 445 U.S. 489 (1980) 21

Windsor v. McVeigh, 93 U.S. 274 (1876) 13

Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985) 10,19

Zurich Insurance v. Raymark Industries, 118 Ill.2d 23 (1987) 15

Statutes:

Ill.Rev.Stat., Chapter 110 §2-1202..... 11

Ill.Rev.Stat., Chapter 110A §301 8

Ill.Rev.Stat., Chapter 110A §366..... 9,11

Ill.Rev.Stat., Chapter 110A §315..... 5

Ill.Rev.Stat., Chapter 110A §317..... 5

Constitutions:

United States Constitution, Amendment Fourteen .....*passim*

Illinois Constitution (1970), Article VI, §6 8,9

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LANDERS SEED CO., INC.,
Petitioner,

VS.

CHAMPAIGN NATIONAL BANK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FOR THE FOURTH JUDICIAL DISTRICT

Petitioner Landers Seed Co. respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court for the Fourth Judicial District in the case *Champaign National Bank, Plaintiff-Appellee-Cross-Appellant v. Landers Seed Co., Defendant-Appellant-Cross-Appellee,* No. 4-87-0460 reported at 165 Ill.App.3d 1090 (1988), affirming in part and reversing in part the judgment of the Illinois Circuit Court for the Sixth Judicial Circuit, Moultrie County, Illinois, in Champaign National Bank v. Landers Seed Co., No. 84-L-4, January 30, 1987.

OPINION BELOW

The opinion of the Illinois Appellate Court for the Fourth Judicial District is reported as set out above and a copy of that opinion is attached as Appendix A to this Petition. (App. 1a-11a). The judgment of the Illinois circuit court is attached as Appendix B to this Petition (App. 12a-13a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257. This Petition is being filed within ninety (90) days of the order entered by the Supreme Court of Illinois on October 6, 1988 denying Petitioner's "Petition for Appeal as a Matter of Right; In the Alternative, Petition for Leave to Appeal" from the judgment of the appellate court. A copy of the Illinois Supreme Court's order is attached as Appendix C to this Petition. (App. 14a).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

1. United States Constitution, Amendment Fourteen. (App. D, 15a-16a).

2. Illinois Constitution (1970), Article VI, §6. (App. E, 17a).

3. *Ill.Rev.Stat.*, Chapter 110A §301. (App. F, 18a).

4. *Ill.Rev.Stat.*, Chapter 110A §366. (App. G, 19a-21a).

5. *Ill.Rev.Stat.*, Chapter 110 §2-1202. (App. H, 22a-23a).

STATEMENT OF THE CASE

Respondent Bank brought this action in the Illinois circuit court by filing a complaint on a promissory note against Petitioner Seed Co. (App. I, 24a-28a). Petitioner answered and counterclaimed. (App. J, 29a-44a). Petitioner's answer raised *inter alia* the affirmative defense of waiver to the Respondent's claim on the note saying Respondent had agreed to forebear collecting an outstanding indebtedness for a period of up to three years while Petitioner attempted to regain profitability. Petitioner's breach of contract counterclaim alleged that in consideration of Petitioner's promise to provide individual guarantees for the Respondent's financing and Petitioner's entry into a direct, as opposed to participation banking relationship with Respondent, Respondent agreed to forebear collecting the outstanding indebtedness for a period of up to three years while Petitioner attempted to regain profitability. Petitioner alleged that Respondent breached its agreement to forebear by forcing the liquidation of Petitioner ten months after the agreement had been entered into. Respondent never filed any pleading contending Petitioner's defenses or counterclaim failed to state defenses or claims or were otherwise insufficient as a matter of law. (App. K, 45a-59a).

The matter went to trial before a jury in Moultrie County, Illinois on the parties' respective claims. Over Petitioner's objection, (App. L, 60a-65a), the jury was instructed that it could return a verdict in favor of both the Respondent on its claim on the note and in favor of Petitioner on its counterclaim. (App. LL, 66a-73a). On January 23, 1987, the jury returned a verdict in the amount of $724,637.37 for the Respondent on its claim on the promissory note and in favor of Petitioner in the amount of $60,833.31 on Petitioner's counterclaim for breach of contract. (App. M, 74a).

Pursuant to Illinois law governing the procedure in civil jury cases, (*Ill.Rev.Stat.* Chapter 110 §2-1202, App. H, 22a-23a) Petitioner filed a post-trial motion seeking amendment of the

verdict, judgment notwithstanding the verdict and new trial. (App. N, 75a-81a). Petitioner asserted in its post-trial motion *inter alia* that the verdicts were inconsistent thereby requiring a new trial.[1] The Respondent also filed a post-trial motion in which it asked for judgment notwithstanding the verdict in favor of Petitioner on its counterclaim. (App. O, 82a-85a). Respondent argued (i) that evidence in violation of the parol evidence rule had been admitted, (ii) evidence in support of Petitioner's damages was insufficient to sustain the verdict of the jury as being remote and speculative, and (iii) the jury was improperly instructed with respect to damages.

The Illinois circuit court denied both parties' respective post-trial motions and entered judgment on the verdict. (App. 12a-13a). Petitioner filed a notice of appeal of right to the Illinois Appellate Court for the Fourth Judicial District in what became action No. 4-87-0460. (App. P, 86a-87a). The Respondent filed a notice of cross-appeal of right from the circuit court's judgment on the verdict in favor of Petitioner on its counterclaim for breach of contract. (App. Q, 88a). Both notices were filed pursuant to Ill.Rev.Stat. Chapter 110A §301, App. F, 18a.

In its brief in the appellate court, (App. R, 89a-106a), the Respondent argued that the trial court had erred (i) in permitting the jury to hear testimony in violation of the parol evidence rule, (ii) in not vacating the verdict in favor of Petitioner on its counterclaim for breach of contract for the reason that the evidence was insufficient to establish that Respondent's breach of contract caused the failure of Petitioner, and (iii) in giving an instruction which had allowed the jury to consider inappropriate items of contract damages. Petitioner filed a reply brief in the appellate court responding to Respondent's aforementioned arguments. (App. S, 107a-121a).

---

[1] See *Moore v. Jewel Tea Co.*, 46 Ill.2d 288, 263 N.E.2d 103 (1970); *Manders v. Pulice*, 44 Ill.2d 511, 256 N.E.2d 330 (1970); *Marotta v. General Motors Corp.*, 108 Ill.2d 168 (1985); *Stewart v. Huff*, 14 Ill.App.3d 782, 303 N.E.2d 641 (1st Dist. 1973).

Oral argument was held in the appellate court on January 11, 1988. At that time, the Respondent stated in response to questioning that the evidence adduced at trial by the Petitioner was sufficient from which the jury could have concluded that there was a contract between Petitioner and Respondent and that the contract had been breached. (App. at 4a-5a, 165 Ill.App.3d 1090, 1093). On January 21, 1988 the appellate court filed its judgment and opinion. (App. 1a-11a). In that judgment and opinion, the appellate court affirmed the judgment for Respondent on its claim on the note. But, the appellate court reversed the judgment of the trial court in favor of the Petitioner saying that (i) the evidence was insufficient to establish that there had been a contract between Petitioner and the Respondent and (ii) the jury verdict finding that the Respondent had breached its contract with Petitioner was "against the manifest weight of the evidence".

Petitioner filed a petition for rehearing in the appellate court, (App. T, 122a-161a). Petitioner argued *inter alia* that it had been deprived its Fourteenth Amendment due process rights as a result of the court reversing the jury verdict in Petitioner's favor on its breach of contract claim without Petitioner having had notice or an opportunity to be heard respecting the issues "sufficiency of the evidence of contract" and sufficiency of the evidence to support the verdict of breach of contract. (App. 157a-160a) The appellate court denied the petition for rehearing. (App. U, 162a).

Petitioner then filed in the Illinois Supreme Court a "Petition for Appeal as a Matter of Right; In the Alternative, Petition for Leave to Appeal" pursuant to Ill.Rev.Stat., Chapter 110A §§315 and 317.* (App. V, 163a-211a). Petitioner contended *in-*

* Ill.Rev.Stat., Chapter 110A §315 provides for leave to appeal from most final judgments of the appellate court as "a matter of sound judicial discretion." Ill.Rev.Stat., Chapter 110A §317 provides for appeals of right from the appellate court to the Illinois Supreme Court "in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the appellate court."

ter alia that the appellate court's judgment had deprived Petitioner of its federal due process right of notice and an opportunity to be heard respecting the sufficiency of the evidence issues. (App. 188a-192a). Petitioner supplemented its Petition for Leave to Appeal in the Illinois Supreme Court in the wake of this Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. ____, 99 L.Ed.2d 565 (1988). (App. W, 212a-215a). The Illinois Supreme Court entered an order October 6, 1988 denying Petitioner's Petition for Appeal as a Matter of Right; In the Alternative, Petition for Leave to Appeal. (App. 14a).

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Was Reached in Conflict With the Fundamental Due Process Principle of Notice and Opportunity for Hearing Established by This Court's Precedents.

At the time Petitioner filed its counterclaim alleging breach of contract against the Respondent, it had a property interest in that claim of which it could not be deprived by adjudication without "notice and an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). As this Court said last term in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. ____, 99 L.Ed.2d 565, 575 (1988), even though "appellant's interest (was) an unsecured claim, a cause of action against the estate for an unpaid bill..., (l)ittle doubt remain(ed) that such an intangible interest is property protected by the Fourteenth Amendment."

That a cause of action gives rise to property protected by the Fourteenth Amendment Due Process Clause was a tenet of this Court's holdings in *Mullane, supra* at 313; *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958); *Martinez v. California*, 444 U.S. 277, 281-282 (1980); and *Logan v. Zimmerman Brush*, 455 U.S. 422, 429 (1982). The fact that the jury found the facts in Petitioner's favor on its breach of contract claim and the court entered judgment thereon certainly cannot do otherwise than strengthen Petitioner's property interest in that claim. *Perry v. Sinderman*, 408 U.S. 593, 601-602 (1972). After the jury verdict and entry of judgment, Petitioner's interest became "tangible". Cf. *Tulsa Professional Collection Services, Inc.*, 99 L.Ed.2d at 575; *Logan v. Zimmerman Brush, supra* at 430.

Once it is determined that a party possesses a property interest, "(a)n elementary and fundamental requirement of due

process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action (purporting to affect that interest) and afford (him) an opportunity to present (his) objections." *Mullane, supra* 339 U.S. at 314. See *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. ____, 99 L.Ed.2d 565, 575. As this Court said in *Boddie v. Connecticut,* 401 U.S. 371, 378-379, the fact "(t)hat the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest...." (emphasis in original.) This Court in *Boddie* said that the right to notice and an opportunity to be heard "reflects a fundamental value in our American constitutional system." *Boddie, supra,* 401 U.S. 371 at 374. "Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the state's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things." *Id.* at 375. "It is", this Court said in *Boddie, supra,* "upon this premise that this Court has through years of adjudication put flesh upon the due process principle." *Id.*

In the instant case, Petitioner filed its notice of appeal as a matter of right from the judgment entered on the jury verdict in the Illinois circuit court in favor of the Respondent Bank on its claim on the promissory note. *Ill.Rev.Stat.* Chapter 110A §301. The Respondent Bank filed its notice of cross-appeal from the judgment entered on the jury verdict in the Illinois circuit court in favor of Petitioner on Petitioner's claim against the Respondent for breach of contract. In Illinois, appellate courts possess primarily appellate jurisdiction only. Illinois Constitution (1970) Article VI §6. (App. 17a). That means that an appellate court's jurisdiction "extends only to those matters in controver-

sy which have been ruled upon by the trial court." *Sprague v. Goodrich,* 376 Ill.80, 32 N.E.2d 897, 900 (1941).[2]

In Illinois, the procedure governing appellate review of jury cases limits a party to urging as error only those points raised in a post-trial motion. *Ill.Rev.Stat.* Chapter 110A §366(b)(2)(iii). (App. 20a) The only portion of the Respondent's brief in the appellate court that dealt with the "sufficiency of the evidence", argued, as had Respondent in its post-trial motion, that the evidence was insufficient to support a jury finding that Petitioner suffered damages as a result of Respondent's breach of contract.[3] Respondent's argument, therefore, assumed that

---

[2] The predecessor to Article VI, §6 of the Illinois Constitution of 1970, Article VI §7 of the Constitution of 1870 which was construed in *Sprague v. Goodrich, supra,* did not contain any provision for the exercise by the appellate court of original jurisdiction. Effective January 1, 1962, however, the 1870 Constitution was amended to provide for the exercise by the appellate court of "such original jurisdiction as may be necessary to the complete determination of any cause on review." SHA Constitution (1870) Article VI, §7. See *Franks v. North Shore Farms, Inc.,* 115 Ill.App.2d 57, 73-74 (1st Dist. 1969). However, that provision is generally restricted to permitting an appellate court to pass upon post-trial motions actually filed in the circuit court but not, for whatever reason, acted upon by the circuit court. *Id.*

[3] The entirety of Respondent's argument in its brief relating to the "sufficiency of the evidence" was as follows:

"B. The Trial Court Erred In Not Vacating The Verdict Of The Jury As to Count I of the Counterclaim Due to the Insufficiency of the Evidence in Establishing That the Bank's Breach of Contract Caused the Failure of Landers Seed Co., Inc.

According to the evidence offered by Landers Seed Co., Inc., the breach of contract committed by the Bank occurred on July 1, 1983 when Lee O'Neill met with Charles Landers and indicated that the company would have to be liquidated. Therefore, the Compilation Report prepared by Nick Piraino for the fiscal year ending June 30, 1983 (Defendant's Exhibit No. 14), is extremely helpful as it reflects the precise financial status of the Company as of June 30, 1983—exactly one day before the Bank allegedly breached its contract. In that respect, Mr. Piraino indicates that the company's current liabilities exceeded its current assets by $1,003,144 and that the stockholders equi-

there had in fact been a contract between the parties and that that contract had been breached.[4]

" 'Reasonable notice' must include disclosure of the *specific* issues (a party) must meet." *Zauderer v. Office of Disciplinary Council,* 471 U.S. 626, 673 (1985), Brennan, J., concurring in part and dissenting in part, quoting *In Re Gault,* 387 U.S. 1, 33-34 (1967) (emphasis in *Zauderer*). Petitioner's reply brief (App. 107a-121a) addressed Respondent's damages argument. Petitioner did not address, as it could not, any argument to the effect that the evidence in support of the jury finding that there had been a contract was insufficient or that the evidence of breach was somehow insufficient. No such argument was ever made by Respondent.

---

ty was a negative $1,249,162. Therefore, the Company had no monetary value as of June 30, 1983 and no fiscal damages could be caused by the alleged breach of contract by the Bank on the following day, July 1, 1983." (App. 104a-105a).

[4] The appellate court suggested (App. 4a) that the Respondent may have made an argument in its brief in that court to the effect that there was not sufficient evidence "for a jury determination of the fact issue relating to the contract count" of Petitioner's countercomplaint. That is not accurate. The nearest Respondent came to saying anything along those lines was at App. 104a where Respondent said "and the Bank never did anything to indicate or otherwise imply that it was not going to enforce the promissory note according to its terms." Assuming that is the argument to which the appellate court was alluding in its opinion, that argument could hardly be said to be "reasonbly calculated under all the circumstances to apprise interested parties", *Mullane, supra,* at 314, that Respondent was questioning the sufficiency of the evidence of contract and the sufficiency of the evidence in support of the jury's verdict.

The other argument of Respondent under its heading B (see footnote 3) to the effect that the trial court erred in not vacating the verdict of the jury as to Count I of the counterclaim refers specifically to the issue of damages, not to the existence or nonexistence of the contract. Therefore, even if the Respondent were correct in this argument, the appellate court would have then been empowered only to reduce the amount of the damages to a nominal award of $1.00 and not vacate the verdict finding the existence of a contract and its breach by the Respondent.

Respondent, consistently with its post-trial motion and brief, stated at oral argument in the appellate court that there was sufficient evidence from which the jury could have concluded that there was a contract between Petitioner and Respondent and that Respondent had breached the contract. (App. 4a-5a), 165 Ill. App. 3rd 1090, 1093). Nonetheless, the appellate court reversed outright the jury verdict in Petitioners favor. The stated bases for its so doing were that there was "insufficient evidence of contract" and that the jury verdict finding the breach of contract was "against the manifest weight of the evidence."

Had the appellate court insisted on compliance with the provisions of *Ill.Rev.Stat.* Chapter 110A §366(b)(2)(iii) (App. 20a) and had, pursuant to that insistence, the Respondent preserved the issues of sufficiency of the evidence of contract and of breach and advanced them on appeal and had the appellate court ruled exactly as it did, Petitioner would have no cause before this Court.[5] In that circumstance, of course, Petitioner would have been put on notice that its property interest in its breach of contract claim against the Respondent was being attacked as being insufficiently supported by the evidence. Petitioner then would have had opportunity "to present (its) objections." *Mullane, supra* at 314. Even if the Respondent had not complied with the provisions of *Ill.Rev.Stat.* Chapter 110 §2-1202 and preserved the issues in the trial court, but had advanced them on appeal whereby Petitioner could have responded in some fashion even if to say that the appellate court had no

---

[5] Had the Respondent preserved the issues decided by the court below and advanced them on appeal, the appellate court would have been obliged to consider the matter pursuant to the standard prescribed by the Illinois Supreme Court in *Pedrick v. Peoria and Eastern RR Co.*, 37 Ill.2d 494 (1967). That standard is that a judgment nov can be "entered only in those cases in which all the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the moving party that no contrary verdict based on that evidence could ever stand." *Pedrick, supra,* 37 Ill.2d at 510.

jurisdiction to hear the issues, the requisites of federal due process surely would have been met. See *Lindsey v. Normet,* 405 U.S. 56, 66 (1972), saying that "(d)ue process requires that there be an opportunity to present every available defense."

But, the appellate court instead extinguished Petitioner's property interest in its contract claim against Respondent without Petitioner having any warning at all that its verdict was in jeopardy. Presumably what happened in this case is isolated and rare. Even though it might be in Petitioner's interest in attempting to persuade this Court to review the judgment below to be able to say what happened here is "a prevalent and recurring problem", Petitioner cannot say that. But, the fact is that it did happen in this case. That it did happen serves notice that it can happen. When it does happen, the result is fundamental and worthy of this Court's concern.

It is fundamental because it implicates "fundamental value(s)". *Boddie, supra,* at 374. Those values include "the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972). The values include "ensur(ing) abstract fair play to the individual." *Id.* They include "... more particularly, ... (the) protect(ion) (of a person's) use and possession of property from arbitrary encroachment..." *Id.* at 81. Ultimately, those values reflect "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his free of governmental interference." *Id.*

In this case, the deprivation took the form of the elimination of a property right which a jury's verdict had made tangible. *Tulsa Professional Collection Services, Inc., supra* at 575. But that certainly does not make it any less a deprivation than that visited upon the claimants against the estate in *Tulsa Professional Collection Services, Inc., supra.* Nor is it less real than the deprivation worked against the known beneficiaries of the trust in *Mullane, supra,* who were not given actual notice of claims against their interests.

In a way, the deprivation worked in this case is even more significant than the deprivations effected in such as *Mullane* and *Tulsa Professional Collection Services, Inc., supra.* The Petitioner in this case was originally an involuntary participant as a defendant in the circuit court in Illinois. That court's processes which had been invoked by the Respondent in this case, became "the only effective means of resolving the dispute...." *Boddie, supra* at 376. But, Petitioner was at least partially successful in the Illinois circuit court, gaining a verdict in its favor on its breach of contract claim. That verdict caused the Respondent to then invoke the power of the Illinois appellate court where, respecting the verdict in its favor, Petitioner became again an involuntary participant. Petitioner again became dependent upon the fairness of the process of that tribunal in protecting Petitioner's property interest which the jury in the trial court had made tangible.

Fairness in the form of due process as observed by Justice Harlan in *Boddie, supra,* "requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.* at 377. Before *Mullane, supra* "this Court voiced the doctrine that '(w)herever one is assailed in his person or property, there he may defend.' " *Id.*, quoting *Windsor v. McVeigh,* 93 U.S. 274, 277 (1876). See also *Baldwin v. Hale,* 1 Wall 223 (1864); *Hovey v. Elliot,* 167 U.S. 409 (1897).

However, when the appellate court in this case resolved the dispute between Petitioner and Respondent without regard for the minimal requisites of due process, "notice and an opportunity for hearing appropriate to the nature of the case", *Mullane, supra* at 313, more than just Petitioner's property interest was adversely affected. Perhaps more importantly, the appellate court as a "social enforcement mechanism", *Boddie, supra,* at 375, failed "to function strictly within these bounds (of due process)...." *Id.* That failure makes more difficult the "maint(enance) (of) an ordered society that is also just." *Id.*

The process employed by the Illinois appellate court in reaching the judgment below departed significantly from processes this Court has said time and again are minimally necessary. Because of the enormity of the departure and the resultant breach of faith with the constitutional system of dispute resolution sanctioned by this Court, this Court should grant review of the judgment below.

II.

The Decision Below Was Reached Contrary to the Fundamental Due Process Principle of Notice and Opportunity for Hearing Established by This Court As Applicable to Criminal Appeals of Right; To The Extent That Principle Does Not Apply to Civil Appeals of Right, This Court Should Make it Applicable.

In "put(ting) flesh", *Boddie, supra* at 375, upon the due process principle of notice and an opportunity to be heard, this Court held in *Evitts v. Lucey,* 469 U.S. 387 (1985), that the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant effective assistance of counsel on a first appeal as a matter of right. The guarantee of the right to effective assistance of counsel in criminal appeals of right serves the basic due process principle invoked in this case of permitting "powerful statements on both sides of the question", *United States v. Cronic,* 466 U.S. 648, 655 (1984). In support of its holding in *Evitts* and in response to the argument that the states were not obliged as a matter of Fourteenth Amendment Due Process to provide for an appellate procedure at all, this Court said

> "the right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a state may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause."

Evitts v. Lucey, 469 U.S. 387, 400-401.

A situation similar to that presented in the instant case was presented in a criminal context in *Cole v. Arkansas,* 333 U.S. 196 (1948). In *Cole,* this Court vacated petitioners' convictions where they had gone to trial on one offense but their convictions had been affirmed by the Arkansas Supreme Court on the basis of evidence in the record suggesting they had committed another offense which the trial court had not considered. In vacating the convictions, Justice Black said for the Court that "to conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole v. Arkansas,* 333 U.S. 196 at 202.[6] See also *Presnell v. Georgia,* 439 U.S. 14, 16 (1978).

This Court's application through the Due Process Clause of the right to the effective assistance of counsel to state appeals as a matter of right was followed this term in *Penson v. Ohio,* No. 87-6116 (November 29, 1988), slip at 9. It is appropriate that the protection of life and liberty interests which are often directly implicated in criminal cases would require this Court to explicitly apply principles of due process first to appeals of right in criminal cases.

---

[6] Petitioner in this case is seemingly more aggrieved than petitioners in *Cole v. Arkansas* for the reason that the court below in this case reversed a verdict which had been in petitioner's favor. That had the effect, of course, of denying petitioner herein trial by jury. If this were a criminal case, that action would be reversible under the rule of *Duncan v. Louisiana,* 391 U.S. 145, 149-158 (1968). However, the Seventh Amendment which guarantees litigants the right to jury trial in civil cases in federal courts has not been applied to the states through the Fourteenth Amendment Due Process Clause. See for e.g. *Minneapolis and St. Louis R. Co. v. Bombolis,* 241 U.S. 211, 215-220 (1916). It may be that Petitioner has a federal constitutional property right to a jury trial created by Illinois Constitution (1970) Article I §13, see *Zurich Insurance v. Raymark Industries,* 118 Ill.2d 23, 57 (1987), under *Board of Regents v. Roth,* 408 U.S. 564, 576-578 (1972). Petitioner is, however, not pursuing that argument.

But, there are at least three discernible lines of authority justifying extension of the *Evitts-Cole* due process principles to civil appeals of right. First, the reasoning of this Court in *Boddie, supra,* relative to the state's exclusive control over the compulsory means of dispute resolution applies with equal vigor at the civil appellate level. Cf. *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). A civil litigant, no less than his counterpart in a criminal case, has a significant constitutional interest - property - at stake. *Logan v. Zimmerman Brush,* 454 U.S. 422 at 428-30; *Tulsa Professional Collection Services, Inc., supra,* 99 L.Ed.2d at 575. This means that the state is "prevented from denying ... litigants use of established adjudicatory procedures, when such action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right(s).' " *Logan v. Zimmerman Brush,* 454 U.S. 420, 429-30, quoting in part *Boddie supra* at 380. In *Pennzoil Oil Co. v. Texaco, Inc.,* 481 U.S. ____, 95 L.Ed.2d 109 (1987) this Court, Brennan J., concurring, said respecting a civil appeal on the authority of *Evitts v. Lucey, supra,* that "(s)ince Texas ha(d) created an appeal as of right from the trial court's judgment, it (could not) infringe on this right to appeal in a manner inconsistent with due process or equal protection."[7] 95 L.Ed.2d 1, 22-23.

Second, the due process principle of notice and opportunity for hearing articulated in *Mullane* is consistent with common law precepts of appellate practice long followed by this Court. For example, in *United States v. American Railway Express Co.,* 265 U.S. 425 (1924), this Court held that an appellee who had not cross-appealed could not attack a lower court's decree with a view to "enlarging his own rights thereunder or of lessen-

---

[7]In *Lindsey v. Normet,* 405 U.S. 56, 77 (1972), a landlord-tenant case, this Court applied the Equal Protection Clause to state civil appeals of right on the authority of *Griffin v. Illinois,* 351 U.S. 12, 18 (1956); *Smith v. Bennett,* 365 U.S. 708 (1961); *Lane v. Brown,* 372 U.S. 477 (1963); *Long v. District Court of Iowa,* 385 U.S. 192 (1966) and *Gardner v. California,* 393 U.S. 367 (1969), all criminal cases.

ing the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Id.* at 435. But, the Court said that an appellee could, without taking a cross-appeal, urge support of the lower court's judgment on the basis of anything in the record so long as he did not increase his rights or decrease those of his adversary. *Id.*

It follows that if an appellee may not seek to enlarge his rights or diminish those of his adversary without a cross-appeal thereby giving notice, an appellate court may not do the same for him without an opportunity for the adverse party to be heard. That point was made explicit by this Court in *Morley Construction Co. v. Maryland Casualty Co.,* 300 U.S. 185 (1937). In *Morley,* Maryland Casualty sued Morley Construction in federal district court for a specific performance of a supplemental bonding agreement and for exoneration respecting outstanding liabilities owed by Morley to subcontractors. The district court refused to enter a decree of specific performance but did require the construction company to exonerate Maryland Casualty. Morley appealed to the Eighth Circuit. Maryland Casualty did not cross-appeal. But, the Court of Appeals indicated that it had grave doubts about the basis for the decree of exoneration and concluded that there should be specific performance of the supplemental bonding agreement between the parties and so directed in its mandate.

Morley sought review in this Court. On the authority of *American Railway Express Co., Inc., supra,* this Court vacated the judgment of the Court of Appeals and in so doing, per Justice Cardozo, said "the substitution of specific performance for exoneration at the instance of the surety was not an affirmance of the decree below, as if the reasons only had been changed with the decisions standing firm." 300 U.S. at 190. Rather, "there was a modification of the decree itself, the facts being found anew and differently, the law declared anew and differently, and the relief remodeled and adapted to the new law

and the new facts." *Id.* 190-191. Accord, *Swarb v. Lennox,* 405 U.S. 191, 202, White, J., concurring (1972); *NLRB v. International Van Lines,* 409 U.S. 48, 52, n.4 (1972); *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 226 n.1 (1975); *United States v. Reliable Transfer Co.,* 421 U.S. 397, 401 n. 2 (1975); *Rondeau v. Mosinee Paper Corp.,* 422 U.S. 49, 62 n.11 (1975); and *Massachusetts Mutual Life Insurance Company v. Ludwig,* 426 U.S. 479, 480 (1976).

American Railway Express and *Morley* are consistent with what this Court required in *Helvering v. Gowran,* 302 U.S. 238 (1937). Therein, this Court held that a federal court of appeals was free to *affirm* a finding by the Board of Tax Appeals on grounds distinct from those employed by the Board in reaching the same decision. But, in that circumstance, this Court held, presumably on a common law theory of fundamental fairness, the taxpayer was entitled "to establish...additional facts which would affect the result." *Helvering v. Gowran* at 247. Cf. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 288, n.4 (1974).

A third line of authority suggesting application of due process principles to civil appeals of right derives from the common law fundamental fairness theory expressed by this Court in *Helvering v. Gowran, supra.* That theory has been recognized by this Court as having a due process root applicable to civil cases. In *Konigsberg v. State Bar,* 353 U.S. 252 (1957), an applicant for admission to the California State Bar had been excluded by reason of his refusal to answer questions about his political philosophy and affiliations. The California Supreme Court affirmed his exclusion. In reversing, this Court said on the authority of *Cole v. Arkansas, supra,* that "serious questions of elemental fairness would be raised if the committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to comply."

353 U.S. at 261. Accord *Spevack v. Klein,* 385 U.S. 511, 518 (1967). See also *FTC v. Fred Meyer, Inc.,* 390 U.S. 341, 364 (1968), Stewart, J., dissenting, saying that due process required this Court to remand to give the respondent in *Fred Meyer* the opportunity to defend against a "novel construction" of Section 2(d) of the Clayton Act relative to the term "customer".

In *Zauderer v. Office of Disciplinary Council,* 471 U.S. 626 (1985), this Court implicitly recognized in the context of a civil appeal the principle Petitioner is asking be specifically applied as a matter of due process to state appeals of right. In *Zauderer,* the appellant lawyer had been disciplined by the Ohio Supreme Court for advertising drunk driving and Dalkon Shield representation. Among other things, he claimed on appeal that he was denied due process by the Ohio Supreme Court in that the basis for discipline affirmed by that court and its Board of Commissioners was different from that asserted by the Office of Disciplinary Council.

This Court, however, disagreed on the facts, saying that under Ohio law, bar discipline was a responsibility of the Ohio Supreme Court with its Board of Commissioners serving only as the body recommending discipline. On that basis, this Court said that the fact that the Board of Commissioners chose to make its recommendation on a basis different from the Office of Disciplinary Council was of no moment for the reason that the board's recommendation put the appellant on notice of the charges he had to answer to the satisfaction of the Ohio Supreme Court. Moreover, this Court observed that the appellant had made no claim that he was not afforded the opportunity to respond to the Board's recommendation in the Ohio Supreme Court. *Zauderer v. Office of Disciplinary Council,* 471 U.S. 626, 654. But, Cf. *Id.,* at 673, Brennan J., concurring in part and dissenting in part, saying on the authority of *Cole v. Arkansas, supra,* that the Ohio Supreme Court's upholding the

discipline on a theory different from that advanced by the Office of Disciplinary Council violated due process of law.[8]

The application to state civil appeals of right of the principle of notice and opportunity for hearing is no more than what the common law has recognized as a precept of fundamental fairness on appeal. *Helvering v. Gowran, supra.* It is no more than what the common law has implicitly recognized as proper appellate practice. *United States v. American Railway Express Co., supra; Morley Construction Co. v. Maryland Casualty Co., supra.* It is not more than this Court has required as a matter of due process for administrative agencies, boards, and commissions at both the state and federal levels. See *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542-546 (1985). See also *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U.S. 292 (1937) where the Court per Justice Cardozo held that the Ohio Public Utilities Commission in taking judicial notice of price trends and land and building values in fixing rates to be charged by the company had violated due process. ("(T)he right to a (fair and open) hearing is one of the 'rudiments of fair play' (*Chicago, Milwaukee, and St. Paul RY. Co. v. Polt,* 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement". 301 U.S. at 304-305.) Further, apart from the fundamental values such as "ensur(ing) abstract fair play...." *Fuentes v. Shevin, supra* at 81, requiring the "government to follow a fair procedure of decision making...", *Id.* at 80, and "protect(ing) (the) use and possession of property from arbitrary encroach-

---

[8] A fourth line of cases following the practice in the federal courts under the Seventh Amendment reaches the same result Petitioner is advocating here. See for example *Home Insurance Co. v. Tydal,* 157 F.2d 851, 852 (5th Cir. 1946), saying that in view of the Seventh Amendment, a court of appeals cannot review the sufficiency of the evidence to support a verdict in civil suit without a party having, by proper motion or request, caused the judge to rule on it. See also *Garcia v. Murphy Pacific Marine Salvaging Co.,* 476 F.2d 303, 306 (5th Cir.1973) to the same effect.

ment...", *Id.* at 81, the purpose of the notice and opportunity for hearing requirement of due process is to ensure accurate decision making. *Cleveland Board of Education v. Loudermill, supra* at 543, and n.8. See also for e.g. *Matthews v. Eldridge,* 424 U.S. 319, 335 (1976).

The Illinois appellate court in its judgment announced a theory of what the requisites for the formation of a contract are under Illinois law. That theory is arguably defensible as a matter of contract law.[9] But, that theory was manifestly not the product of the adversary process - it was not forged from "powerful statements on both sides of the issue." *United States v. Cronic,* 466 U.S. 648, 655 (1984). Indeed, it wasn't forged from any statements on either side of the issue. The judgment was, rather, the sua sponte creation of the appellate court without regard to the positions of the parties. That creation radically increased the rights of the Respondent and more radically decreased those of the Petitioner. Cf. *American Railway Express Co., supra.* And, Petitioner had no forewarning or opportunity to be heard.

The hearing to which Petitioner should have been entitled is a question of federal law. *Cleveland Board of Education v. Loudermill, supra* at 541. See *Vitek v. Jones,* 445 U.S. 489, 491 (1980). At a minimum, Petitioner should have been permitted to brief and argue that the appellate court's theory of the requisites for contract formation were met by the record developed in the case. *Loudermill, supra* at 545-546. See also *Lindsey v. Normet, supra,* 405 U.S. at 77. More completely, Petitioner should have been given the opportunity to develop

---

[9] Petitioner certainly does not concede that the appellate court was correct in its theory or correct in its application of the legal principles announced in its opinion to the trial record developed in this case. Indeed, Petitioner contends there are substantial misstatements of the record in the opinion, a position with which the Respondent as evidenced by its statements at oral argument (App. at 4a, 165 Ill.App.3d 1090, 1093), is in apparent agreement.

additional facts to meet the requisites announced after the fact by the appellate court in the event the evidentiary record as developed was in fact inadequate. See *Helvering v. Gowran, supra* at 245-247. As aptly stated in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, n.4 (1974),

> "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."

(citations omitted)

Petitioner is not asking this Court to declare the due process right of "notice and opportunity for a hearing", *Mullane, supra* at 313, "absolute to (its) logical extreme...." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974), quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). For example, Petitioner is not asking this Court to consider whether that right is applicable where the state conduct is entirely discretionary. See *Meachum v. Fano*, 427 U.S. 215, 228 (1976). Nor is Petitioner asking the Court to consider the applicability of the notice and opportunity for hearing component of due process to situations or fora where "(t)he critical issue...is not whether there has been a 'correct adjudication....' " *Ross v. Moffitt, supra.* And, Petitioner is not asking this Court to impose procedural protections on a proceeding which, while available, is not fundamental. Cf. *Pennsylvania v. Finley*, 481 U.S. ____, 95 L.Ed.2d 539, 548 (1987) and *Penson v. Ohio, supra* ____ U.S. ____, No. 87-6616, slip, 3-9 (November 29, 1988), the former holding that appointed counsel is not obliged as a matter of due process to submit an Anders Brief (*Anders v. California*, 386 U.S. 738, 744 (1967)) on appeal from a state trial court's denial of post-conviction relief, the latter holding that appointed counsel is so obliged on a first appeal of right from the initial conviction.

What Petitioner is asking is far more fundamental. No less in this case than in *Griffin v. Illinois,* 351 U.S. 12, 18 (1956), "(a)ppellate review has become an integral part of the Illinois trial system...." Therefore, Petitioner is asking this Court to consider making the requirement of notice and opportuntiy for hearing explicitly applicable to a civil appeal of right which is so situated as to be "not only the paramount dispute-settlement technique, but, in fact, the only available one." *Boddie, supra* at 377.[10] That application was adumbrated in *Evitts v. Lucey, supra.* To the extent that application remains at all in the shadows, this case would permit the Court to make it clear.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Illinois Appellate Court for the Fourth Judicial District.

Respectfully submitted,

John H. Bisbee
Law Offices of John H. Bisbee
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

---

[10] Absent this Court granting review under 28 U.S.C. § 1257, a litigant such as Petitioner might be without means to vindicate its claim under the Constitution. In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), this Court held that a federal district court does not have subject matter jurisdiction to review as being violative of the Constitution the final judgment of the highest court of a jurisdiction in a particular case. The "*Rooker-Feldman*" doctrine was recently applied in *Stern v. Nix,* 840 F.2d 208 (3d Cir. 1988), cert. denied, No. 87-2077, October 3, 1988, 57 LW 3231.

APPENDIX

APPENDIX A

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

No. 4-87-0460

The Champaign National Bank,
a National Banking Association,
Plaintiff-Appellee and
Cross-Appellant,

v.

Landers Seed Co., Inc., Charles Landers,
Glen Landers, Maxine Landers, and Lorelyn Landers,
Defendants-Appellants and
Cross-Appellees.

Appeal from Circuit Court
County of Moultrie
No. 84L4

Honorable Worthy B. Kranz,
Judge Presiding.

Law Offices of John H. Bisbee
437 North LaFayette Street
Macomb, IL 61455
John H. Bisbee
Of Counsel
FOR APPELLANT

James W. Evans, Ltd.
Evans & Froehlich
Attorneys at Law
44 Main Street
P.O. Box 737
Champaign, IL 61820
FOR APPELLEE

Filed: January 21, 1988

JUSTICE LUND delivered the opinion of the court:

The plaintiff Champaign National Bank, a national banking association, and defendant Landers Seed Company, Inc., both appeal from a judgment on a jury verdict returned in the circuit court of Moultrie County.

Plaintiff brought an action on a promissory note against defendant, and the jury returned a verdict in favor of the plaintiff for $724,637.37. Defendant counterclaimed on a theory of contract to make future loans, and the jury returned a verdict in favor of defendant, against plaintiff, for $60,833.31. Judgment on the verdicts was entered.

A condensed statement of defendant's position on appeal is (1) the trial court erred in not entering judgment *n.o.v.* in favor of the defendant because the evidence establishes waiver as to the plaintiff's right to call the debt evidenced by the promissory note; and (2) the verdicts are inconsistent, and the verdict in favor of the plaintiff must be set aside and a new trial granted. Defendant basically claims any judgment against it is against the manifest weight of the evidence.

Plaintiff contends (1) the trial court allowed evidence in violation of the parol evidence rule; (2) the trial court erred in not granting its motion to set aside the judgment in favor of defendant for $60,833.31 as being against the manifest weight of the evidence; and (3) the trial court erred in giving jury instruction No. 23 which provided for consideration of, in plaintiff's opinion, inappropriate items of contract damages.

Defendant was a seed business operated by Charles Landers in Sullivan, Illinois. Plaintiff originally participated in loans defendant obtained through the First National Bank of Sullivan. On August 23, 1982, the plaintiff became a direct lender to defendant, and, at that time, the $1,200,000 representing plaintiff's share of the participating indebtedness to the

First National Bank of Sullivan, plus interest due on the $1,200,000 in the amount of $81,126.83, was transferred to a 120-day promissory not due plaintiff from defendant in the amount of $1,281,126.83. This note was secured by various quarantees and mortgages executed by Charles Landers, his wife, his father, and his mother. This note was renewed for 120 days on December 21, 1982, and it is uncontested that the unpaid principal and interest at the time of the verdict was $724,637.37.

The plaintiff called the debt in July 1983, directing liquidation of the corporation. On January 16, 1984, plaintiff filed its complaint seeking judgment on the note. Defendant eventually filed counterclaims which, at trial time, were based on breach of contract, fraud, and bad-faith dealings. The allegations in the counterclaims also resulted in affirmative defenses of waiver, estoppel, and bad faith.

Basically, all of defendant's counterclaims and defenses are based on allegations of promises made to the Landers at the August 23, 1982, meeting where notes and security documents were executed. The alleged commitment was to continue financing Landers Seed Company as long as there was progress towards profitability and a chance at profitability. These so-called promises are the basis for the counterclaim based on contract, as well as the basis for all other defenses and counterclaims.

Some discussion of the evidence is necessary. In answer to a question as to whether Lee O'Neill, the plaintiff's agent, made any representations respecting profitability at the August 23, 1982, meeting, Charles Landers states:

> "As far as any, we didn't talk about any dollars, no. All we talked about was the idea that as long as we made progress towards profitability, had a chance at profitability, paid our interest and worked with Lee, gave him the information he wanted from us that he would not collect on the note."

He further stated in answer to questions:

> "A. Well, I think he gave us the assurances at that particular point in time that they would forebear; they would be willing to work with our firm until such time as we become profitable, as long as we paid the interest and we worked with them and we did the things that they wanted us to do, they were going to stay with us. And he understood that was going to take some time. He understood that might take up to three years.
>
> Q. Did he say up to three years?
>
> A. That was in the discussion and we talked about it and I think he understood and yes, I believe he said it."

According to Charles Landers, the assurances were required before the Landers executed the various documents on August 23, 1982. O'Neill denied the execution of the documents was conditioned on any assurances by him, and he denied offering terms of any kind. He did testify that he had indicated:

> "[T]he bank was willing to work with the corporation as long as the corporation was performing and as long as the corporation was moving toward profitability, as long as the financial structure of the corporation and the financial structure of the guarantors was not adversely changed."

We reverse the $60,833.31 judgment against the plaintiff and affirm the $724,637.77 judgment against the defendant for two reasons.

INSUFFICIENT EVIDENCE OF CONTRACT

We are aware that counsel for plaintiff appeared to admit sufficient evidence existed for a jury determination of the fact ssue relating to the contract count of the defendant's counter-complaint. However, a contrary argument was made in the brief filed by the plaintiff. We have examined the trial evidence, and for purposes of creating proper precedent, have elected to

base our opinion upon the evidence and the law, not upon the opinions of counsel.

The terms of a contract must be reasonably certain. Some terms may be missing or left to be agreed upon, but if the essential term or terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract. Restatement (Second) of Contract sec. 33 (1981).

An agreement to continue to refinance or roll over a debt appears similar to an oral contract to lend money in the future. A valid cause of action for breach of an oral contract to lend money in the future is recognized in Illinois. (*Wait v. First Midwest Bank/Danville* (1986), 142 Ill. App. 3d 703, 707, 491 N.E.2d 795, 800; *Bank of Lincolnwood v. Comisco, Inc.* (1982), 111 Ill. App. 3d 822, 444 N.E.2d 657.) The party claiming such a contract must show that the alleged agreement contains sufficient definitiveness to be enforceable. (*Wait*, 142 Ill.App. 3d. at 708, 491 N.E.2d at 801; *Carrico v. Delp* (1986), 141 Ill. App. 3d 684, 688, 490 N.E.2d 972, 975.) In *Wait* and *Carrico*, our court cited *McErlean v. Union National Bank* (1980), 90 Ill. App. 3d 1141, 414 N.E.2d 128, where it was held an agreement to loan money in the future was enforceable only if it contemplated the terms upon which the future loan should be made. The *McErlean* court stated:

> "These terms would include, for example, the intended duration of the line of credit; the applicable rate of interest to be charged for any loan emanating from such an agreement, or the basis for how such interest would be ascertained; what duration or date or dates were contemplated for maturity of such loans; and what mode or rate of repavement was contemplated, *i.e.*, whether the entire amount would be repavable or if repavment in installments would be acceptable." 90 Ill. App. 3d at 1146, 414 N.E.2d at 132.

We recognize that in some fact situations "duration" can be inferred based on custom (*Wait*, 142 Ill. App. 3d at 709, 491 N.E.2d at 801), and part performance of an agreement may remove uncertainty and establish an enforceable contract. (*Yoder v. Rock Island Bank* (1977), 47 Ill. App. 3d 486, 491, 362 N.E.2d 68, 72.) We find that this cannot be done under the facts established by the evidence in the present case.

According to Charles Landers' testimony, O'Neill agreed not to collect on the note "as long as we make progress toward profitability, had a chance at profitability." Who is to judge the element of "progress towards profitability," or the element of "chance of profitability?" As will be discussed in more detail later in this opinion, the evidence indicated a loss by defendant of $375,551 for the fiscal year ending June 30, 1982, and a loss of $854,492 for the fiscal year ending June 30, 1983. The corporate debts exceeded assets on June 30, 1983, by $1,000,000. Charles Landers had failed in his projection as to corporate income in the fall of 1981, in the spring of 1982, and at various times during the 1982-83 fiscal year.

No cost of money terms were included in the alleged agreement; no terms exist as to additional capital advances or duration of loans; maturity dates were not provided; mode or rate of repayment was not contemplated.

Previous decisions upholding oral contracts to loan money involved facts which were not necessarily in conflict with the parol evidence rule. Recognizing the possibility of an oral contract in the present case, to renew notes in the future, appears to necessarily create an exception to the rule. The promissory note provides for payment in 120 days after date and also specifically allows for collection on default or if the lender should deem itself insecure. Such terms appear inconsistent with an oral agreement to continue to refinance.

The parol evidence rule is not a rule of evidence but a rule of substantive law. Prior written and oral agreements are, by the

new written contract, made ineffective. There can be partly written agreements and partly oral agreements. (Restatement (Second) of Contracts sec. 213 (1981).) In the present case, the written instruments provide for collection with different terms than the suggested oral agreement.

The exception we recognize to the parol evidence rule must not be so broad as to create a waiver of the requirements of certainty and definiteness in contracts. Any other holding would invite havoc to the world of financing.

We find that the facts before the trial court are not sufficient to provide the necessary definitiveness. We further find that the so-called contract did not contemplate the terms of future loans or refinancing of existing loans. As a result, a contract cannot exist as a matter of law, and the jury verdict against plaintiff must be reversed. This holding is consistent with our recent opinion in *McClellan v. Banc Midwest* (Dec. 31, 1987, 4th Dist. Gen. No. 4-87-0305), Ill. App. 3d ____, N.E.2d.

Defendant argues that the affirmative defense of waiver was a necessary result of the jury's verdict on the contract claim of the counterclaim. Corbin on Contracts (3A A. Corbin, Contracts sec. 752, at 480 (1960)) is cited for the proposition that if a vender "merely states to the purchaser that he does not insist on payment on time, he thereby eliminates it as a condition." Corbin is cited further for the proposition that if a vendor eliminates the condition in exchange for consideration, and consideration is given, there is still waiver, but it is also a modification by a substitute contract.

In the present case, defendant would have us recognize a waiver of the right to collect an obligation based on the theory the plaintiff received consideration in the nature of defendant allowing a direct relationship between defendant and plaintiff. It is suggested that the loan participation status did not give plaintiff direct rights against defendant.

The only evidence of the participation agreements between the First National Bank of Sullivan and the Champaign National Bank is defendant's exhibit No. 12, which is a certificate of participation dated October 8, 1981. This relates to a $120,000 payment of Champaign National Bank's participation in a loan of $120,000 made to Landers Seed Company evidenced by a note dated October 8, 1981. While the certificate appears to reserve collection decisions with the Sullivan bank, the Sullivan bank acknowledges holding a *pro rata* share in all collateral and guarantees for the Champaign bank. An obligation of good faith was imposed on the Sullivan bank in its participation dealings with the Champaign National Bank. (Ill. Rev. Stat. 1985, ch. 26, par. 1-203.) The argument that plaintiff did not have effective remedies against defendant and guarantees prior to August 23, 1982, is not established by the evidence and is without merit.

On the issue of waiver, defendant cites *John Kubinski & sons, Inc. v. Dockside Development Corp.* (1975), 44 Ill. App. 3d 1015, 339 N.E.2d 529 (which involved time of performance of a dredging contract); *Hart v. Lyons* (1982), 106 Ill. App. 3d 803, 436 N.E.2d 723; *Will v. Will Products, Inc.* (1982), 109 Ill. App. 3d 778, 441 N.E.2d 343 (both of which involved time is of the essence clauses in real estate contracts); *Pantle v. Industrial Comm'n* (1975), 61 Ill. 2d 365, 335 N.E.2d 491 (which held no waiver of the time limitation in filing a claim for workers' compensation); *Aetna Life Insurance Co. v. Sanford* (1902), 200 Ill. 126, 65 N.E. 661 (which dealt with the late payment of a life insurance premium); and *Anderson v. Creighton* (1975), 26 Ill. App. 3d 375, 325 N.E.2d 85 (which involved the waiver of an age condition for a life insurance policy).

Restatement (Second) of Contracts (Restatement (Second) of Contracts sec. 84 (1981)) applies to the law of waiver. A subnote to that section provides as follows:

> "[d.] *Conditions which may be waived.*
> The rule of Subsection (1) applies primarily to conditions

> which may be thought of as procedural or technical, or to instances in which the non-occurrence of condition is comparitively minor. Examples are conditions which merely relate to the time or manner of the return performance or provide for the giving of notice or the supplying of proofs. Insurance policies ordinarily contain conditions of notice and proof of loss and of time for suit; and guarantors, indorsers and other sureties may be discharged by an agreement varying the duty of the principal debtor, by failure of diligence in presentment or prosecution, or by failure to give a required notice. In such cases, even though a promise to disregard the non-occurrence of the condition subjects the promisor to a new duty, the new duty is not regarded as significantly different from the old and the promise is binding without consideration, reliance, or formality. See, *e.g.*, Uniform Commercial Code sec. 3-606 Comment 2."

The right to collect a debt when due is not a procedural or technical right, and the change in the right to collect is significantly different from the terms of the written contract, *i.e.*, the promissory note. Waiver cannot apply to the facts in evidence in the present case.

THE VERDICT FINDING THAT PLAINTIFF VIOLATED TERMS OF THE ALLEGED CONRACT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

Champaign National Bank was participating in the defendant's loans to the extent of $500,000 as of September 1981. O'Neill met with Charles Landers in September 1981 and was told that defendant would show a profit in excess of $50,000 for the fiscal year ending June 30, 1982. In April 1982, the plaintiff had loan participants to the extent of $1,000,000, and Charles Landers asked for $200,000 more. At that time, Landers estimated losses at $100,000 for the fiscal year. Infusion of capital from outside sources was recommended by O'Neill.

At the April 1982 meeting, Landers projected 1982-83 fiscal year profits to be between $50,000 and $55,000. The certified public accountant's report showed the loss for the fiscal year ending June 30, 1982, to be $378,551. An accompanying note criticized the method of computing inventory value, suggesting overrevaluation, thus, substantially reducing the amount of the loss.

From August 23, 1982, until July 1, 1983, O'Neill and Charles Landers were in frequent contact. O'Neill was to be furnished with monthly financial reports. The $1,281,126.83 was evidenced by a new note on December 21, 1982. Interest was paid monthly through February 1983, but not thereafter. Principal payments were made from the sale of property owned by Charles Landers' parents. According to O'Neill, and not refuted by Charles Landers, there was a meeting on March 29, 1983, during which O'Neill expressed concern and suggested finding a buyer for defendant. Landers, on March 29, indicated there would be a loss for the fiscal year.

On May 12, 1983, Landers requested an additional $300,000 loan. It was not given. Landers was selling inventory to pay overhead expenses, and the cash flow problem was critical.

On July 1, 1983, a meeting was held with Charles Landers indicating the loss for fiscal year ending June 30, 1983, would be $500,000. Landers provided a 1983-84 fiscal year projection which indicated two scenarios, one showing an $800 profit and one showing a $73,000 projected loss.

The eventual CPA report shows a fiscal year loss of $854,492 and stated current liabilities exceeded current assets by $1,003,144.

A decision by plaintiff that the defendant could not become profitable would, under the facts presented, be a sound business judgment, and any holding to the contrary would be against the manifest weight of the evidence. Charles Landers' projections

were never in the ballpark. His failure to use the realistic value of inventory in the fiscal year ending June 30, 1982, distorted the new loss. According to the testimony of defendant's CPA, the loss should have been increased $416,000. Not only were Charles Landers' projections erroneous, but he had used poor judgment in overvaluing inventory for purposes of determining 1982 losses.

Plaintiff's actions were reasonable and justifiable even if an agreement had existed.

We affirm the judgment in favor of plaintiff and reverse and vacate the judgment in favor of defendant.

Affirmed in part; reversed in part.

GREEN, P.J., and SPITZ, J., concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL DISTRICT
MOULTRIE COUNTY, ILLINOIS

No. 84-L-4

The Champaign National Bank,
a National Banking Association,
Plaintiff-Counterdefendant,

v.

Landers Seed Co., Inc., Charles Landers,
Glen Landers, Maxine Landers, and Lorelyn Landers,
Defendants-Counterplaintiffs.

Filed: June 30, 1987

JUDGMENT ORDER

THIS CAUSE coming on to be heard pursuant to the denial of the Post-Trial Motions previously filed by the parties hereto by Order entered on June 3, 1987, and the Court having previously entered on the Docket the return of a Jury Verdict herein on January 23, 1987, and being otherwise fully advised in the premises, the Court hereby orders, adjudges and decrees as follows:

1. That judgment be entered in favor of the CHAMPAIGN NATIONAL BANK and against LANDERS SEED CO., INC. in the amount of $724,637.37 with respect to its Complaint and that the judgment by confession previously entered herein as to said parties, is hereby revived, reinstated and restored to the date of its original entry, to-wit: January 16, 1984.

2. That judgment be entered in favor of LANDERS SEED CO., INC. and against the CHAMPAIGN NATIONAL BANK in the amount of $60,833.31 with respect to Count I of its Counterclaim.

3. That this Judgment Order is a final Order and there is no just reason for delaying any appeal hereof.

ENTER: June 29, 1987

/s/ W.B. Kranz

APPROVED AS TO FROM:

/s/ James W. Evans, Ltd. — For Plaintiff and Counterdefendant, CHAMPAIGN NATIONAL BANK

/s/ John H. Bisbee, — For Defendant and Counterplaintiff, LANDERS SEED CO., INC.

APPENDIX C

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

Received: October 6, 1988

Mr. John H. Bisbee
Attorney at Law
437 N. Lafayette St.
Macomb, IL 61455

No. 66901 The Champaign National Bank, etc., respondent, v. Landers Seed Co., Inc., petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition to appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1988.

APPENDIX D

United States Constitution, Amendment 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives — Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State

legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debt incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation the provisions of this article.

APPENDIX E

Ill. Constitution (1970) Art. VI

§ 6. Appellate Court — Jurisdiction.

Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal. The Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts. The Appellate Court may exercise original jurisdiction when necessary to the complete determination of any case on review. The Appellate Court shall have such powers of direct review of administrative action as provided by law.

APPENDIX F

Ill.Rev.Stat. Chapter 110A, § 301

301. Supreme Court Rule 301. Method of Review.

Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding. All rights that could have been asserted by appeal or writ of error may be asserted by appeal. No formal exception need be taken in order to make any ruling or action of the court reviewable.

APPENDIX G

Ill.Rev.Stat. Chapter 110A, § 366

366. (Supreme Court Rule 366). Powers of Reviewing Court—Scope of Review and Procedure—Lien of Judgment

(a) Powers. In all apppeals the reviewing court may, in its discretion, and on such terms as it deems just:

(1) exercise all or any of the powers of amendment of the trial court;

(2) allow substitution of parties by reason of marriage, death, bankruptcy, assignment, or any other cause, allow new parties to be added or parties to be dropped, or allow parties to be rearranged as appellants or appellees, on such reasonable notice as it may require;

(3) order or permit the record to be amended by correcting errors or by adding matters that should have been included;

(4) draw inferences of fact; and

(5) enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require.

(b) Scope of Review

(1) *General*

(i) Error of Law. Any error of law affecting the judgment or order appealed from may be brought up for review.

(ii) *Error of Fact.* Any error of fact, in that the judgment or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review.

(2) *Scope and Procedure on Review in Jury Cases.* In jury cases the following rules govern:

(i) *Instructions.* No party may raise on appeal the failure to give an instruction unless he shall have tendered it.

(ii) *Remittitur.* Consenting to a remittitur as a condition to the denial of a new trial does not preclude the consenting party from asserting on appeal that the amount of the verdict was proper. No cross-appeal is required.

(iii) *Post-Trial Motion.* A party may not urge as error on review of the ruling on his post-trial motion any point, ground, or relief not specified in the motion.

(iv) *Review of Conditional Rulings on Post-Trial Motion.* The reviewing court, if it determines to reverse an unconditional ruling of the trial court on a post-trial motion, may review and determine any conditional rulings made by the trial court on other questions raised by the motion. No cross-appeal is required.

(v) *Review Under Rule 306.* If a petition under Rule 306 for leave to appeal from an order allowing a new trial is granted, all rulings of the trial court on the post-trial motions are before the reviewing court, notwithstanding the absence of a final judgment.

(3) *Scope and Procedure on Review in Nonjury Cases.* In nonjury cases the following rules govern:

(i) *Special Findings and Motions Unnecessary.* No special findings of fact, certificate of evidence, propositions of law, motion for a finding, or demurrer to the evidence is necessary to support the judgment or

as a basis for review. The sufficiency of the evidence to support the judgment is subject to review without formal action to preserve the question.

(ii) *Post-Trial Motions.* Neither the filing of nor the failure to file a post-trial motion limits the scope of review.

(iii) *Procedure When Judgment at Close of Plaintiff's Case is Reversed.* If a judgment entered in favor of the defendant pursuant to a motion for a finding or judgment at the close of plaintiff's case is reversed on appeal, the case shall be remanded with directions to proceed as though the motion had been denied by the trial court or waived.

Lien of Judgment. If the reviewing court enters final judgment and orders its enforcement, a certificate or certified copy of the judgment may be filed in the office of the recorder of deeds of any county in which real estate of the judgment debtor is situated and, in case of registered land, a memorial therof entered upon the register of the last certificate of the title to be affected, and the judgment shall thereupon have the same force and effect as a lien upon the real estate, as if the judgment had been originally rendered by a court in that county.

Amended Oct. 21, 1969, eff. Jan. 1, 1970; May 28, 1982, eff. July 1, 1982.

APPENDIX H

Ill.Rev.Stat. Chapter 110, § 2-1202.

2-1202. Reserved ruling on motion for directed verdict—Post-trial motions in jury cases

§ 2-1202. Reserved ruling on motion for directed verdict—Post-trial motions in jury cases. (a) If at the close of the evidence, and before the case is submitted to the jury, any party moves for a directed verdict the court may (1) grant the motion or (2) deny the motion or reserve its ruling thereon and submit the case to the jury. If the court denies the motion or reserves its ruling thereon, the motion is waived unless the request is renewed in the post-trial motion.

(b) Relief desired after trial in jury cases, heretofore sought by reserved motion for directed verdict or motions for judgment notwithstanding the verdict, in arrest of judgment or for new trial, must be sought in a single post-trial motion. Relief after trial may include the entry of judgment if under the evidence in the case it would have been the duty of the court to direct a verdict without submitting the case to the jury, even though no motion for directed verdict was made or if made was denied or ruling thereon reserved. The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the etnry of a judgment, the granting of a new trial or other appropriate relief. Relief sought in post-trial motions may be in the alternative or may be conditioned upon the denial of other relief asked in preference thereto, as for example, a new trial may be requested in the event a request for judgment is denied.

(c) Post-trial motions must be filed within 30 days after the entry of judgment or the discharge of the jury, if no verdict is reached, or within any further time the court may allow within the 30 days or any extensions thereof. A party against whom judgment is entered pursuant to post-trial motion shall have like time after the entry of the judgment within which to file a post-trial motion.

(d) A post-trial motion filed in apt time stays enforcement of the judgment.

(e) Any party who fails to seek a new trial in his or her post-trial motion, either conditionally or unconditionally, as herein provided, waives the right to apply for a new trial, except in cases in which the jury has failed to reach a verdict.

(f) The court must rule upon all relief sought in all post-trial motions. Although the ruling on a portion of the relief sought renders unnecessary a ruling on other relief sought for purposes of further proceedings in the trial court, the court must nevertheless rule conditionally on the other relief sought by determining whether is should be granted if the unconditional rulings are thereafter reversed, set aside or vacated. The conditional rulings become effective in the event the unconditional rulings are reversed, set aside or vacated.

P.A. 82-280, § 2—1202, eff. July 1, 1982.

APPENDIX I

IN THE CIRCUIT COURT OF MOULTRIE COUNTY, ILLINOIS

AT LAW
NO. 84-L-4

The Champaign National Bank,
a National Banking Association,
Plaintiff,

v.

Landers Seed Co., Inc., Charles Landers, Glen Landers, Maxine Landers and Lorelyn R. Landers,
Defendants.

COMPLAINT AND CONFESSION ON JUDGMENT NOTE

1. Plaintiff, THE CHAMPAIGN NATIONAL BANK, a National Banking Association owns each of the following promissory notes, executed and delivered, for value received, by defendant, LANDERS SEED CO, INC., CHARLES LANDERS, GLEN LANDERS, MAXINE LANDERS, and LORELYN R. LANDERS, for business purposes

Date	Amount
1. December 21, 1982	$1,281,726.83
2. Guaranty, August 23, 1982	$1,281,726.83

Each note is attached as an exhibit.

Each note was executed in this county, or as defendant resides in this county, or real or personal property owned by a defendant is located in this county.

There is due from defendant:

$675,309.41	Principal
49,327.96	interest
Reserved	attorney's fee
$724,637.37	TOTAL plus reasonable

attorney's fees

Plaintiff asks judgment againt defendant for the amount due.

/s/ Arthur L. Mann
Attorney for Plaintiff

Name: ARTHUR L. MANN
LAW OFFICES OF DODSON & MANN
Attorney for Plaintiff
Address: 201 W. University, Suite 204; P.O. Box 1772
City: Champaign, IL 61820
Telephone: (217) 359-9630

AFFIDAVIT

Steven C. Vandenberg, Vice President on oath states that the allegations in this complaint are true.

/s/ Steven C. Vandenberg

Signed and sworn to before me
January 13, 1984
Arthur L. Mann
Notary Public

CONFESSION

Defendant, LANDERS SEED CO., INC., CHARLES LANDERS, GLEN LANDERS, MAXINE LANDERS and LORELYN R. LANDERS

by Richard Winkel
his attorny, waives service of process and confesses that there is due from defendant to plaintiff:

Principal	$675,309.41
Interest	49,327.96
Attorney's fee	Reserved
TOTAL	$724,637.37 plus reasonable

attorney's fees

Defendant agrees that judgment may be entered against him for the total above and for costs, and releases and waives all rights as authorized in the warrant of attorney.

Richard Winkel

Name: Richard Winkel
Harrington, Porter & Pope
Attorney for defendant
Address: 201 W. University, Suite 205
City: Champaign, IL 61820
Telephone: (217) 352-4167

JUDGMENT ORDER

It is ordered that plaintiff THE CHAMPAIGN NATIONAL BANK, a National Banking Association

recover from defendant LANDERS SEED CO, INC., CHARLES LANDERS, GLEN LANDERS, MAXINE LANDERS and LORELYN R. LANDERS

Principal	$675,309.41
Interest	49,327.96
Attorney's fee	Reserved
Total Judgment	$724,637.37 plus

reasonable attorney's fees and costs of suit. Execution may issue.

Plaintiff may withdraw the original notes upon filing copies.

ENTER:
JUDGE

_____,19_____.

No. 84653. . . .Previous No. 53389. . .

Champaign, Illinois, December 21, 1982

120 Days after date, for value received, the undersigned, jointly and severally, promise to pay to the order of

THE CHAMPAIGN NATIONAL BANK

One Million Two Hundred Eighty-one Thousand and Seven Hundred Twenty-six & 83/100 DOLLARS at its office in Champaign, Illinois, with interest from date at rate of 13.00* per cent per annum until paid, together with costs and reasonable attorney fees if this note be placed in the hands of an attorney for collection.

The said bank or its assigns is hereby authorized to apply upon this note or upon any other indebtedness of the undersigned or either of them or each and every guarantor and endorser hereof to said bank at its option at any time before or after the maturity thereof, any money or other property in the possession of said bank or its assigns belonging to the undersigned or either of them or each and every guarantor and endorser hereof.

If default be made in the payment of the indebtedness evidenced hereby, or any part thereof, or if the holder hereof shall deem itself insecure, then the entire indebtedness aforesaid shall at the option of the holder, and without notice, be and become immediately due and payable.

And to secure the payment of said amount the undersigned hereby authorize, irrevocably, any attorney of any Court of Record to appear for undersigned in such Court, in term, or vacation, after the instrument is due by maturity or acceleration, and to confess a judgment without process in favor of the

holder of this Note for such amount as may appear to be unpaid thereon, together with interest, costs and reasonable attorneys' fees on amount due, admitting the allegations of any complaint filed in connection with this note, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon said judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof.

All parties hereto severally waive presentment for payment, demand and protest and hereby consent to any extensions, releases or agreements not to sue of any person in any way liable hereone or of any collateral securing the same, which rights are expressly reserved for the holder hereof.

*adjusted monthly to CNB prime.

Landers Seed Co., Inc.
/s/ Charles Landers, President

Address: Box 120, Sullivan, IL 61951
Due: April 20, 1983
Discount: $ Collect-monthly
Secured by: S/A, Mort
684-111 2

Prime

APPENDIX J

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
MOULTRIE COUNTY, ILLINOIS

No. 84-L-4

The Champaign National Bank,
a National Banking Association,
Plaintiff & Counterdefendant,

vs.

Landers Seed Co., Inc., Charles Landers, Glen Landers,
Maxine Landers, and Lorelyn Landers,
Defendants,

and

Landers Seed Co., Inc.,
Counterplaintiff.

ANSWER AND COUNTERCLAIM

The Defendant Landers Seed Co., Inc., by its Attorneys, hereby answers the Plaintiff's Complaint heretofore filed as follows:

FIRST DEFENSE

1. Defendant admits the allegation contained in Paragraph 1 of Plaintiff's Complaint.

2. Defendant admits that the promissory notes alleged to have been executed were executed but denies that any legal consequences in Plaintiff's favor flow from such execution.

3. Defendant denies that any sums are due and owing Plaintiff by Defendant on account of the promissory notes alleged in Paragraph 1 of Plaintiff's Complaint for the affirmative reasons hereinafter set forth.

FIRST AFFIRMATIVE DEFENSE

For a further defense to Plaintiff's Complaint, Defendant hereby alleges as follows:

1. That on or about August 23, 1982, Plaintiff and Defendant Landers Seed Co., Inc. entered into a "loan agreement," a copy of which is attached hereto as Exhibit "A" and incorporated by reference herein, whereby the Plaintiff and said Defendant consolidated the outstanding indebtedness of Defendant Landers Seed Co., Inc. into one debt in the principal amount of One Million Two Hundred Eighty One Thousand Seven Hundred Twenty Six Dollars and 83/100 ($1,281,726.83).

2. That pursuant to said agreement entered into August 23, 1982, the Plaintiff agreed to extend the money represented by said Exhibit "A" and agreed to forebear any collection efforts respecting said principal sum of money until such time as the Defendant Landers Seed Co., Inc. was back on a "profitable" footing which, the Plaintiff through its officer and agent, one Lee O'Neill, represented could consume up to three years, to wit, until August, 1985 or thereabouts.

3. That further, pursuant to their understanding that the Plaintiff intended to work with Defendant Landers Seed Co., Inc. in an effort to make it "profitable," Landers Seed Co., Inc. expended efforts to carry on the business of Landers Seed Co., Inc. as usual and in doing so incurred contractual rights and obligations.

4. That in consideration for the agreement by the Plaintiff as hereinabove set forth to help put Defendant Landers Seed Co., Inc. on a profitable footing and to forebear collecting any of the outstanding indebtedness as represented by Exhibit "A" attached hereto, Defendant Landers Seed Co., Inc. executed a "security agreement" in favor of the Plaintiff, copy of which "security agreement" is attached hereto as Exhibit "B" and incorporated by reference herein.

5. That thereafter, on or about the 1st of July, 1983, notwithstanding the agreement expressed in that document attached hereto as Exhibit "A" and further nothwithstanding the express representations made to the Defendant herein to the effect that the Plaintiff would work with said Defendant in the attempt to make Landers Seed Co., Inc. profitable over a period of up to three years, the Plaintiff indicated to the Defendant that it intended to liquidate Landers Seed Co., Inc. and put the Defendant out of business for reasons which remain to this date unclear to the Defendant.

6. That the instant lawsuit commenced by Plaintiff on or about January 16, 1984, is the culmination of the intention expressed by Plaintiff on or about the first week of July, 1983, both of which are contrary to the agreement between Plaintiff on the one hand and Defendant on the other as articulated in that "loan agreement" dated August 23, 1982, a copy of which is attached hereto as Exhibit "A."

7. That the Plaintiff Champaign National Bank, by engaging in the aforementioned conduct set forth in Paragraphs 1 through 5 of the First Affirmative Defense, waived whatever rights it had pursuant to the notes and guarantys in its favor, all of which are incorporated into said loan agreement of August 23, 1982 until the passage of at least three years from August 23, 1982, to wit, until May 23, 1985.

8. That accordingly, by virtue of having waived whatever rights it possessed by virtue of the foregoing, Plaintiff is, at this time, possessed of no rights vis-a-vis the Defendant.

SECOND AFFIRMATIVE DEFENSE

For a further defense, Defendant alleges as follows:

1. That on or about August 23, 1982, Plaintiff and Defendant Landers Seed Co., Inc. entered into a "loan agreement," a copy of which is attached hereto as Exhibit "A" and incorporated by reference herein, whereby the Plaintiff and said

Defendant consolidated the outstanding indebtedness of Defendant Landers Seed Co., Inc. into one debt in the principal amount of One Million Two Hundred Eighty One Thousand Seven Hundred Twenty Six Dollars and 83/100 ($1,281,726.83).

2. That pursuant to said agreement entered into August 23, 1982, the Plaintiff agreed to extend the money represented by said Exhibit "A" and agreed to forebear any collection efforts respecting said principal sum of money until such time as the Defendant Landers Seed Co., Inc. was back on a "profitable" footing which, the Plaintiff through its officer and agent, one Lee O'Neill, represented could consume up to three years, to wit, until August, 1985 or thereabouts.

3. That further, pursuant to its understanding that the Plaintiff intended to work with Defendant Landers Seed Co., Inc. in an effort to make it "profitable," Landers Seed Co., Inc. expended efforts to carry on the business of Landers Seed Co., Inc. as usual and in doing so incurred contractual rights and obligations.

4. That in consideration for the agreement by the Plaintiff as hereinabove set forth, Defendant Landers Seed Co., Inc. executed a "security agreement" in favor of the Plaintiff, copy of which "security agreement" is attached hereto as Exhibit "B" and incorporated by reference herein.

5. In conformity with its understanding of the agreement entered into with the Champaign National Bank, Landers Seed Co., Inc. proceeded to expend efforts to put itself on a profitable basis by making efforts to market its seed corn, by entering into contractual relationships with various growers and buyers, and by purchasing the necessary equipment to that end and employed the necessary personnel to that end.

6. That thereafter, on or about the 1st of July, 1983, notwithstanding the agreement expressed in that document attached hereto as Exhibit "A" and further nothwithstanding the express

representations made to the Defendant herein to the effect that the Plaintiff would work with said Defendant in the attempt to make Landers Seed Co., Inc. profitable over a period of up to three years, the Plaintiff indicated to the Defendant that it intended to liquidate Landers Seed Co., Inc. and put the Defendant out of business for reasons which remain to this date unclear to the Defendant.

7. That the instant lawsuit commenced by Plaintiff on or about January 16, 1984, is the culmination of the intention expressed by Plaintiff on or about the first week of July, 1983, both of which are contrary to the agreement between Plaintiff on the one hand and Defendant on the other as articulated in that "loan agreement" dated August 23, 1982, a copy of which is attached hereto as Exhibit "A."

8. That accordingly, the Plaintiff by causing the Defendant Landers Seed Co., Inc. to further expend energies and efforts pursuant to making Landers Seed Co., Inc. profitable as it understood it was doing pursuant to its August 23, 1982 agreement with Plaintiff, and, by virtue of the security agreement, attached hereto as Exhibit "B," whereby the Defendant committed itself to a strict accounting of its activity to Plaintiff, by virtue of all of which said Defendant has clearly materially changed its position to its detriment based upon Plaintiff's above stated actions, for which reason the Plaintiff should be equittably estopped from enforcing any rights it has pursuant to any promissory notes and guarantees which are incorporated into that certain "loan agreement" dated August 23, 1982, a copy of which is attached hereto as Exhibit "A."

THIRD AFFIRMATIVE DEFENSE

For a further defense, Defendant alleges as follows:

1. That on or about August 23, 1982, Plaintiff and Defendant Landers Seed Co., Inc. entered into a "loan agreement," a copy of which is attached hereto as Exhibit "A" and incor-

porated by reference herein, whereby the Plaintiff and said Defendant consolidated the outstanding indebtedness of Defendant Landers Seed Co., Inc. into one debt in the principal amount of One Million Two Hundred Eighty One Thousand Seven Hundred Twenty Six Dollars and 83/100 ($1,281,726.83).

2. That pursuant to said agreement entered into August 23, 1982, the Plaintiff agreed to extend the money represented by said Exhibit "A" and agreed to forebear any collection efforts respecting said principal sum of money until such time as the Defendant Landers Seed Co., Inc. was back on a "profitable" footing which, the Plaintiff through its officer and agent, one Lee O'Neill, represented could consume up to three years, to wit, until August, 1985 or thereabouts.

3. That further, pursuant to their understanding that the Plaintiff intended to work with Defendant Landers Seed Co., Inc. in an effort to make it "profitable," Landers Seed Co., Inc. expended efforts to carry on the business of Landers Seed Co., Inc. as usual and in doing so incurred contractual rights and obligations.

4. That in consideration for the agreement by the Plaintiff as hereinabove set forth, Defendant Landers Seed Co., Inc. executed a "security agreement" in favor of the Plaintiff, copy of which "security agreement" is attached hereto as Exhibit "B" and incorporated by reference herein.

5. That thereafter, on or about the 1st of July, 1983, notwithstanding the agreement expressed in that document attached hereto as Exhibit "A" and further nothwithstanding the express representations made to the Defendant herein to the effect that the Plaintiff would work with said Defendant in the attempt to make Landers Seed Co., Inc. profitable over a period of up to three years, the Plaintiff indicated to the Defendant that it intended to liquidate Landers Seed Co., Inc. and put the Defendant out of business for reasons which remain to this date unclear to the Defendant.

6. That nevertheless, by entering into the agreement dated August 23, 1982, copy of which is attached hereto as Exhibit "A" and incorporated by reference herein, the Plaintiff and the Defendant Landers Seed Co., Inc., intended to and did modify those promissory notes to which reference is made in Plaintiff's Complaint and by so doing modified the liability of said Defendant to Plaintiff to the extent that said Defendant did not become liable to Plaintiff until such time as the Landers Seed Co., Inc. was operating on a "profitable" basis, notwithstanding any indication in the promissory notes to the contrary.

7. That the Defendant Landers Seed Co., Inc. has fully and completely performed all terms and conditions of the agreement entered into between it and the Plaintiff herein on August 23, 1982.

8. That therefore by virtue of having so modified this agreement with the Defendant, as hereinabove set forth, Plaintiff has no legal rights vis-a-vis Defendant at this time.

WHEREFORE, Defendant prays that Plaintiff's Complaint be absolutely denied and dismissed and Defendant awarded its costs.

DEFENDANT DEMANDS TRIAL BY A JURY OF SIX (6).

COUNTERCLAIM

Defendant and Counterplaintiff Landers Seed Co., Inc., an Illinois corporation, hereinafter designated "Landers," for its counterclaims against the Plaintiff and Counterdefendant Champaign National Bank, hereinafter designated "Bank," hereby complains and alleges as follows:

COUNT I

1. That on or about August 23, 1982, Bank and Landers entered into a "loan agreement," a copy of which is attached hereto as Exhibit "A" and incorporated by reference herein, whereby the Bank and said Landers consolidated the outstand-

ing indebtedness of Landers into one debt in the principal amount of One Million Two Hundred Eighty One Thousand Seven Hundred Twenty Six Dollars and 83/100 ($1,281,726.83).

2. That pursuant to said agreement entered into August 23, 1982, the Bank agreed to extend the money represented by said Exhibit "A" and agreed to forebear any collection efforts respecting said principal sum of money until such time as Landers was back on a "profitable" footing which, the Bank through its officer and agent, one Lee O'Neill, represented could consume up to three years, to wit, until August, 1985 or thereabouts.

3. That further, pursuant to Landers' understanding that the Bank intended to work with Landers in an effort to make it "profitable," Landers expended efforts to carry on the business of Landers Seed Co., Inc. as usual and incurred contractual rights and obligations in furtherance of those efforts.

4. That in consideration of the agreement by the Bank as hereinabove set forth, Landers executed a "security agreement" in favor of the Bank, a copy of which "security agreement" is attached hereto as Exhibit "B" and incorporated by reference herein.

5. That Landers has performed all its obligations pursuant to its agreement of August 23, 1982.

6. That thereafter, on or about the 1st of July, 1983, notwithstanding the agreement expressed in that document attached hereto as Exhibit "A" and further nothwithstanding the express representations made by the Bank and its officers and agents to Landers herein to the effect that the Bank would work with Landers in the attempt to make Landers Seed Co., Inc. profitable over a period of up to three years, the Bank indicated to Landers that it intended to liquidate Landers and put Landers out of business for reasons which remain to this date unclear to Landers.

7. That the instant lawsuit commenced by the Bank on or about January 16, 1984, is the culmination of the immediately aforementioned intention expressed by the Bank on or about the first week of July, 1983, to liquidate Landers which is contrary to the agreement between the Bank on the one hand and Landers on the other as articulated in that "loan agreement" dated August 23, 1982, a copy of which is attached hereto as Exhibit "A."

8. That accordingly, the Bank by causing individually named Defendants to be subjected to personal liability to the Bank when they otherwise would not have, by causing Landers to further expend energies and efforts pursuant to making Landers Seed Co., Inc. profitable as it understood it was doing pursuant to its August 23, 1982 agreement with the Bank, and, by virtue of the security agreement, attached hereto as Exhibit "B," Landers committed itself to a strict accounting of its activity to the Bank, by virtue of all of which Landers has clearly materially changed its position to its detriment based upon the Bank's above stated actions.

9. That by virtue of the foregoing, the Bank has breached its aforementioned agreement of August 23, 1982 with Landers to work with Landers in efforts to assist in its assuming a profitable stance as a consequence of which Landers has been damaged in a sum according to proof, but nevertheless substantially in excess of Fifteen Thousand Dollars ($15,000.00).

10. That Landers has fully attempted to mitigate its damages.

WHEREFORE, Defendant Landers prays the Court to enter judgment in favor of the Defendant Landers as follows:

a. Damages in a sum according to proof but nevertheless in excess of Fifteen Thousand Dollars ($15,000.00),

b. Interest at the statutory rate,

c. Reasonable attorneys' fees,

d. Expert witness fees, in any, and

e. Such other and further relief as the Court deems just and appropriate under the circumstances.

COUNT II

1. That on or about August 23, 1982, Bank and Landers entered into a "loan agreement," a copy of which is attached hereto as Exhibit "A" and incorporated by reference herein, whereby the Bank and said Landers consolidated the outstanding indebtedness of Landers into one debt in the principal amount of One Million Two Hundred Eighty One Thousand Seven Hundred Twenty Six Dollars and 83/100 ($1,281,726.83).

2. That pursuant to said agreement entered into August 23, 1982, the Bank agreed to extend the money represented by said Exhibit "A" and agreed to forebear any collection efforts respecting said principal sum of money until such time as Landers was back on a "profitable" footing which, the Bank through its officer and agent, one Lee O'Neill, represented could consume up to three years, to wit, until August, 1985 or thereabouts.

3. That further, pursuant to Landers' understanding that the Bank intended to work with Landers in an effort to make it "profitable," Landers expended efforts to carry on the business of Landers Seed Co., Inc. as usual and incurred contractual rights and obligations in furtherance of those efforts.

4. That in consideration of the agreement by the Bank as hereinabove set forth, Landers executed a "security agreement" in favor of the Bank, a copy of which "security agreement" is attached hereto as Exhibit "B" and incorporated by reference herein.

5. That Landers has performed all its obligations pursuant to its agreement of August 23, 1982.

6. That thereafter, on or about the 1st of July, 1983, notwithstanding the agreement expressed in that document attached hereto as Exhibit "A" and further nothwithstanding the express representations made by the Bank and its officers and agents to Landers herein to the effect that the Bank would work with Landers in the attempt to make Landers Seed Co., Inc. profitable over a period of up to three years, the Bank indicated to Landers that it intended to liquidate Landers and put Landers out of business for reasons which remain to this date unclear to Landers.

7. That the instant lawsuit commenced by the Bank on or about January 16, 1984, is the culmination of the immediately aforementioned intention expressed by the Bank on or about the first week of July, 1983, to liquidate Landers which is contrary to the agreement between the Bank on the one hand and Landers on the other as articulated in that "loan agreement" dated August 23, 1982, a copy of which is attached hereto as Exhibit "A."

8. That by virtue of the foregoing, the Bank engaged in a fraudulent and deceitful pattern of conduct by representing to Landers it intended to abide by the agreement that it had struck with Landers on August 23, 1982, upon which agreement Landers relied, when in fact the Bank well knew it had no intention of abiding by that agreement as evidenced by its conduct commencing with the week of July 1, 1983 and culminating in the instant lawsuit filed January 13, 1984, and as a consequence, the Bank has willfully, wantonly, and with a reckless disregard of its own representations and promises undertaken to force Landers out of business all the Landers' damage.

9. That as a direct and proximate result of the foregoing, Landers further expended energies and efforts pursuant to making Landers Seed Co., Inc. profitable as it understood it was obliged to do pursuant to its August 23, 1982 agreement with the Bank, and, Landers committed itself to a strict accounting

of its activity to the Bank, by virtue of both of which Landers has clearly materially changed its position to its detriment.

10. That as a proximate result of the Bank's conduct in the aforementioned respect, Landers has been damaged in a sum according to proof, but nevertheless in excess of Fifteen Thousand Dollars ($15,000.00).

11. That Landers has fully attempted to mitigate its damages.

WHEREFORE, Defendant Landers prays the Court to enter judgment in favor of the Defendant Landers as follows:

a. Damages in a sum according to proof but nevertheless in excess of Fifteen Thousand Dollars ($15,000.00),

b. Punitive damages in the amount of Two Million Dollars ($2,000,000.00),

c. Interest at the statutory rate,

d. Reasonable attorneys' fees,

e. Expert witness fees, in any, and

f. Such other and further relief as the Court deems just and appropriate under the circumstances.

COUNT III

1. That on or about August 23, 1982, Bank and Landers entered into a "loan agreement," a copy of which is attached hereto as Exhibit "A" and incorporated by reference herein, whereby the Bank and said Landers consolidated the outstanding indebtedness of Landers into one debt in the principal amount of One Million Two Hundred Eighty One Thousand Seven Hundred Twenty Six Dollars and 83/100 ($1,281,726.83).

2. That pursuant to said agreement entered into August 23, 1982, the Bank agreed to extend the money represented by said Exhibit "A" and agreed to forebear any collection efforts

respecting said principal sum of money until such time as Landers was back on a "profitable" footing which, the Bank through its officer and agent, one Lee O'Neill, represented could consume up to three years, to wit, until August, 1985 or thereabouts.

3. That further, pursuant to Landers' understanding that the Bank intended to work with Landers in an effort to make it "profitable," Landers expended efforts to carry on the business of Landers Seed Co., Inc. as usual and incurred contractual rights and obligations in furtherance of those efforts.

4. That in consideration of the agreement by the Bank as hereinabove set forth, Landers executed a "security agreement" in favor of the Bank, a copy of which "security agreement" is attached hereto as Exhibit "B" and incorporated by reference herein.

5. That Landers has performed all its obligations pursuant to its agreement of August 23, 1982.

6. That thereafter, on or about the 1st of July, 1983, notwithstanding the agreement expressed in that document attached hereto as Exhibit "A" and further nothwithstanding the express representations made by the Bank and its officers and agents to Landers herein to the effect that the Bank would work with Landers in the attempt to make Landers Seed Co., Inc. profitable over a period of up to three years, the Bank indicated to Landers that it intended to liquidate Landers and put Landers out of business for reasons which remain to this date unclear to Landers.

7. That the instant lawsuit commenced by the Bank on or about January 16, 1984, is the culmination of the immediately aforementioned intention expressed by the Bank on or about the first week of July, 1983, to liquidate Landers which is contrary to the agreement between the Bank on the one hand and Landers on the other as articulated in that "loan agreement" dated August 23, 1982, a copy of which is attached hereto as Exhibit "A."

8. That as a direct and proximate result of the foregoing, Landers further expended energies and efforts pursuant to making Landers Seed Co., Inc. profitable as it understood it was obliged to do pursuant to its August 23, 1982 agreement with the Bank, and, Landers committed itself to a strict accounting of its activity to the Bank, by virtue of both of which said Landers has clearly materially changed its position to its detriment.

9. That by virtue of the foregoing, the Bank disregarding the rights of Landers, and disregarding its obligations to Landers, willfully, wantonly, and maliciously undertook to breach its aforementioned agreement of August 23, 1982 to work with Landers in efforts to assist in its assuming a profitable stance, as a consequence of which Landers has been damaged in a sum according to proof.

10. That Landers has fully attempted to mitigate its damages.

WHEREFORE, Defendant Landers prays the Court to enter judgment in favor of the Defendant Landers as follows:

a. Damages in a sum according to proof but nevertheless in excess of Fifteen Thousand Dollars ($15,000.00),

b. Punitive damages in the amount of Two Million Dollars ($2,000,000.00),

c. Interest at the statutory rate,

d. Reasonable attorneys' fees,

e. Expert witness fees, in any, and

f. Such other and further relief as the Court deems just and appropriate under the circumstances.

DEFENDANT AND COUNTERPLAINTIFF LANDERS DEMANDS TRIAL BY A JURY OF SIX (6) ON ITS COUNTERCLAIM.

Respectfully Submitted:

LAW OFFICES OF
JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

BY: Original Duly Executed
JOHN H. BISBEE

AFFIDAVIT

Defendant Landers Seed Co., Inc. by Charles Landers being first duly swon deposes and states that the information in the foregoing Answer and Counterclaim is true and correct, and your Affiant would so state if called to testify with respect to the content of said Answer and Counterclaim.

FURTHER YOUR AFFIANT SAITH NOT.

LANDERS SEED CO., INC.

/s/ Charles Landers

STATE OF ILLINOIS)
) ss
COUNTY OF McDONOUGH)

Subscribed and sworn to before me this 20th day of April, 1984.

/s/Dianna K. Matthews
NOTARY PUBLIC

EXHIBIT "A"

Loan Agrement

August 23, 1982

First National Bank of Sullivan
Landers Seed Co., Inc.
The Champaign National Bank

All of the above parties agree to the following terms in regards to the credit provided by The Champaign National Bank to Landers Seed Co., Inc.

1. All principal reduction on the Landers Seed debt will be applied first to The Champaign National Bank until such time as their indebtedness is paid in full, subject to payment in full to Scott State Bank, Bethany, IL.

2. The 10% compensating balance by The First National Bank of Sullivan will continue in effect proportionate to the principal balance outstanding, until the loan is paid in full.

3. As consideration for the agreements contained in items 1 and 2 above, The Champaign National Bank agrees to extend credit to The Landers Seed Co., Inc. in the total amount of $1,281,726.83, the proceeds of said credit to be applied to the indebtedness of Landers Seed Co., Inc. with the First National Bank of Sullivan and participated to The Champaign National Bank.

The First National Bank of Sullivan
By: /s/Jan W. Hargan, Exec. V.P.

The Champaign National Bank
By: /s/Lee H. O'Neill, V.P.

Landers Seed Co., Inc.
By: /s/Charles Landers, Pres.

APPENDIX K

INDEX 84-L-4

VOLUME I

	Page No.
COMPLAINT AND CONFESSION ON JUDGMENT NOTE, Filed January 16, 1984	C 1
Court Proceedings, January 16, 1984	C 6
MOTION TO DISMISS THIRD PARTY CITATION, Filed January 20, 1984	C 8
Court Proceedings, January 20, 1984	C 12
NOTICE OF HEARING, Filed January 23, 1984	C 14
Court Proceedings, January 24, 1984	C 17
CITATION, Filed January 25, 1984	C 19
CITATION, Filed January 25, 1984	C 23
CITATION, Filed January 25, 1984	C 27
THIRD-PARTY CITATION, Filed January 25, 1984	C 31
CITATION, January 25, 1984	C 34
Court Proceedings, January 26, 1984	C 38
NOTICE, January 31, 1984	C 40
Court Proceedings, February 1, 1984	C 43
NOTICE OF TAKING DISCOVERY DEPOSITION UPON ORAL EXAMINATION AND REQUEST FOR PRODUCTION OF DOCUMENTS, Filed February 6, 1984	C 45
ENTRY OF APPEARANCE, Filed February 6, 1984	C 48

INDEX 84-L-4 Continued

	Page No.
Court Proceedings, February 7, 1984	C 50
MOTION TO VACATE JUDGMENT BY CONFESSION, Filed February 14, 1984	C 52
MOTION TO STAY SUPPLEMENTARY PROCEEDINGS, Filed February 14, 1984	C 55
Court Proceedings, February 14, 1984	C 58
AMENDED NOTICE OF TAKING DISCOVERY DEPOSITION UPON ORAL EXAMINATION AND REQUEST FOR PRODUCTION OF DOCUMENTS, Filed February 15, 1984	C 60
Court Proceedings, February 16, 1984	C 63
MOTION TO STAY SUPPLEMENTARY PROCEEDINGS, Filed February 16, 1984	C 65
MOTION TO VACATE JUDGMENT BY CONFESSION, Filed February 16, 1984	C 69
Court Proceedings, February 20, 1984	C 72
SECOND AMENDED NOTICE OF TAKING DISCOVERY DEPOSITION UPON ORAL EXAMINATION AND REQUEST FOR PRODUCTION OF DOCUMENTS, Filed February 22, 1984	C 74
Court Proceedings, February 23, 1984	C 77
NOTICE OF HEARING, Filed February 23, 1984	C 79
Court Proceedings, February 24, 1984	C 81
ALIAS THIRD-PARTY CITATION, Filed February 29, 1984	C 83

INDEX 84-L-4 Continued

	Page No.
Court Proceedings, March 1, 1984	C 86
SUBPOENA FOR DEPOSITION, Filed March 12, 1984	C 88
SUBPOENA FOR DEPOSITION, Filed March 12, 1984	C 90
MEMORANDUM IN SUPPORT OF MOTION TO VACATE JUDGMENT BY CONFESSION, Filed March 21, 1984	C 92
Court Proceedings, March 21, 1984	C 98
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO VACATE JUDGMENT BY CONFESSION, Filed March 28, 1984	C 100
MEMO OF JUDGMENT, Filed March 28, 1984	C 108
Court Proceedings, March 28, 1984	C 113
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO VACATE JUDGMENT BY CONFESSION, Filed April 2, 1984	C 115
Court Proceedings, April 3, 1984	C 118
MOTION TO OPEN JUDGMENT AND FOR LEAVE TO FILE ANSWER AND COUNTER-CLAIM, Filed April 24, 1984	C 120
Court Proceedings, April 25, 1984	C 145
CORRESPONDENCE, Filed April 25, 1984	C 147
Court Proceedings, April 27, 1984	C 151
MOTION FOR LEAVE TO FILE AMENDED COM-PLAINT, Filed May 7, 1984	C 153

INDEX 84-L-4 Continued

	Page No.
AMENDED COMPLAINT, Filed May 7, 1984	C 156
Court Proceedings, May 9, 1984	C 161
ORDER, Filed May 9, 1984	C 163
NOTICE OF HEARING, Filed May 11, 1984	C 168
Court Proceedings, May 14, 1984	C 171
Court Proceedings, May 17, 1984	C 173
PROOF OF SERVICE OF NOTICE, Filed May 17, 1984	C 175
MOTION TO DISMISS AMENDED COMPLAINT, Filed June 15, 1984	C 177
Court Proceedings, June 18, 1984	C 180
MOTION TO DISMISS AMENDED COMPLAINT, Filed June 18, 1984	C 183
AFFIDAVIT IN SUPPORT OF MOTION TO OPEN JUDGMENT AND FOR LEAVE TO FILE ANSWER PURSUANT TO ILL. REV. STAT., CHAPTER 110A, §276, Filed June 18, 1984	C 187
COUNTER-AFFIDAVIT IN OPPOSITION TO MOTION TO OPEN JUDGMENT AND FOR LEAVE TO FILE ANSWER PURSUANT TO ILL. REV. STAT., CH. 110A, §276, Filed June 18, 1984	C 189
APPEARANCE, Filed June 18, 1984	C 193
MOTION FOR ADDITIONAL TIME TO PLEAD, Filed June 18, 1984	C 196
Court Proceedings, June 19, 1984	C 200

INDEX 84-L-4 Continued

Page No.

MEMORANDUM IN SUPPORT OF MOTION TO OPEN JUDGMENT BY CONFESSION, Filed June 20, 1984 C 202

Court Proceedings, June 21, 1984 C 207

MOTION TO DISMISS AMENDED COMPLAINT, Filed June 29, 1984 C 210

Court Proceedings, July 2, 1984 C 214

Court Proceedings, July 3, 1984 C 216

Court Proceedings, July 5, 1984 C 218

VOLUME II

MEMORANDUM IN OPPOSITION TO MOTION TO OPEN JUDGMENT BY CONFESSION, Filed July 5, 1984 C 220

Court Proceedings, July 6, 1984 C 227

MEMORANDUM, Filed July 6, 1984 C 229

Court Proceedings, July 10, 1984 C 232

ORDER, Filed July 11, 1984 C 234

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AMENDED COMPLAINT, Filed July 23, 1984 C 236

Court Proceedings, July 24, 1984 C 242

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT, Filed July 27, 1984 C 244

INDEX 84-L-4 Continued

	Page No.
MEMORANDUM IN SUPPORT OF DEFENDANT CHARLES LANDERS' MOTION TO DISMISS AMENDED COMPLAINT, Filed July 30, 1984	C 255
Court Proceedings, July 31, 1984	C 259
MEMORANDUM OF JUDGMENT, Filed August 2, 1984	C 261
Court Proceedings, August 3, 1984	C 266
REPLY TO AFFIRMATIVE DEFENSES AND COUNTERCLAIM, August 3, 1984	C 268
Court Proceedings, August 7, 1984	C 277
MOTION FOR RECONSIDERATION, REQUEST FOR SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW AND OBJECTION TO FORM OF ORDER, Filed August 15, 1984	C 279
Court Proceedings, August 16, 1984	C 284
NOTICE, Filed August 17, 1984	C 286
Court Proceedings, August 20, 1984	C 289
Court Proceedings, September 10, 1984	C 291
ANSWER TO AMENDED COMPLAINT, Filed October 1, 1984	C 293
Court Proceedings, October 1, 1984	C 298
DEFENDANT CHARLES LANDERS' ANSWER TO AMENDED COMPLAINT, Filed October 1, 1984	C 300
Court Proceedings, October 2, 1984	C 304

INDEX 84-L-4 Continued

	Page No.
ANSWER TO AMENDED COMPLAINT, Filed October 3, 1984	C 306
Court Proceedings, October 4, 1984	C 318
ORDER, Filed October 5, 1984	C 320
Court Proceedings, October 5, 1984	C 323
REPLY TO AFFIRMATIVE DEFENSES OF DEFENDANT LORELYN R. LANDERS, Filed October 25, 1984	C 325
REPLY TO AFFIRMATIVE DEFENSES OF DEFENDANT CHARLES LANDERS, Filed October 25, 1984	C 328
REPLY TO AFFIRMATIVE DEFENSES AND COUNTER-CLAIMS OF DEFENDANTS GLEN LANDERS AND MAXINE LANDERS, Filed October 25, 1984	C 331
Court Proceedings, October 26, 1984	C 336
MOTION TO CONSOLIDATE, Filed October 31, 1984	C 338
Court Proceedings, November 1, 1984	C 342
NOTICE OF HEARING, Filed December 18, 1984	C 344
Court Proceedings, December 19, 1984	C 347
Court Proceedings, February 22, 1985	C 349
Court Proceedings, March 4, 1985	C 351
REQUEST FOR PRODUCTION OF DOCUMENTS, Filed March 19, 1986	C 353

INDEX 84-L-4 Continued

	Page No.
Court Proceedings, March 20, 1986	C 357
MOTION FOR PROTECTIVE ORDER, Filed March 26, 1986	C 359
Court Proceedings, March 27, 1986	C 362
MOTION FOR SUMMARY JUDGMENT AS TO LANDERS SEED CO., INC., Filed April 11, 1986	C 364
Court Proceedings, April 14, 1986	C 391
NOTICE, Filed April 14, 1986	C 393
Court Proceedings, April 15, 1986	C 395
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO LANDERS SEED CO., INC., Filed May 14, 1986	C 397
Court Proceedings, May 15, 1986	C 401
ANSWER TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, Filed June 2, 1986	C 403
Court Proceedings, June 3, 1986	C 416
SUPPLEMENT TO PARAGRAPH 6 OF LANDERS' ANSWER TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, Filed June 3, 1986	C 418
CORRESPONDENCE WITH MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, Filed June 9, 1986	C 433
Court Proceedings, June 10, 1986	C 448
Court Proceedings, June 10, 1986	C 450

INDEX 84-L-4 Continued

Page No.

VOLUME III

PROOF OF SERVICE OF NOTICE, Filed June 11, 1986 C 452

PROOF OF SERVICE OF NOTICE OF CIVIL PRETRIAL CONFERENCES, Filed July 1, 1986 C 454

Court Proceedings, July 7, 1986 C 456

NOTICE OF PRETRIAL CONFERENCE, Filed July 9, 1986 C 458

Court Proceedings, July 10, 1986 C 460

Court Proceedings, July 15, 1986 C 462

PRE-TRIAL MEMORANDUM OF CHAMPAIGN NATIONAL BANK, Filed July 15, 1986 C 464

NOTICE OF TAKING DISCOVERY DEPOSITIONS UPON ORAL EXAMINATION, Filed September 12, 1986 C 475

REQUEST FOR PRODUCTION OF DOCUMENTS, Filed September 12, 1986 C 478

Court Proceedings, September 15, 1986 C 482

AMENDED NOTICE OF TAKING DISCOVERY DEPOSITION UPON ORAL EXAMINATION OF LEWIS CLAUSEN, Filed September 25, 1986 C 484

SUBPOENA FOR DEPOSITION, Filed September 26, 1986 C 487

Court Proceedings, September 26, 1986 C 489

INDEX 84-L-4 Continued

	Page No.
SECOND AMENDED NOTICE OF TAKING DISCOVERY AND EVIDENCE DEPOSITIONS UPON ORAL EXAMINATION OF LEWIS CLAUSEN, Filed September 29, 1986	C 491
NOTICE OF TAKING DISCOVERY DEPOSITION UPON ORAL EXAMINATION, Filed September 29, 1986	C 494
AMENDED NOTICE OF TAKING DISCOVERY DEPOSITION UPON ORAL EXAMINATION, Filed October 1, 1986	C 497
SECOND AMENDED NOTICE OF TAKING DISCOVERY DEPOSITION UPON ORAL EXAMINATION, Filed October 3, 1986	C 500
Court Proceedings, October 3, 1986	C 503
SUBPOENA FOR DEPOSITION, Filed October 7, 1986	C 505
SUBPOENA FOR DEPOSITION, Filed October 15, 1986	C 507
NOTICE OF TAKING DISCOVERY AND EVIDENCE DEPOSITIONS UPON ORAL EXAMINATION, Filed October 31, 1986	C 509
Court Proceedings, November 3, 1986	C 512
ANSWER TO REQUEST FOR PRODUCTION OF DOCUMENTS, Filed November 6, 1986	C 514
Court Proceedings, November 7, 1986	C 518
Court Proceedings, November 10, 1986	C 520

INDEX 84-L-4 Continued

	Page No.
Court Proceedings, January 12, 1987	C 522
MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE LANDERS SEED CO., INC., Filed January 12, 1987	C 525
MOTION TO WITHDRAW, Filed January 12, 1987	C 529
MOTION IN LIMINE, Filed January 12, 1987	C 531
THIRD AFFIRMATIVE DEFENSE, Filed January 12, 1987	C 535
MOTION FOR LEAVE TO AMEND ITS ANSWER AND COUNTERCLAIM, Filed January 12, 1987	C 542
SUBPOENA, Filed January 12, 1987	C 548
SUBPOENA — GENERAL, Filed January 13, 1987	C 550
APPEARANCE, Filed January 13, 1987	C 555
Court Proceedings, January 13, 1987	C 557
Court Proceedings, January 14, 1987	C 559
Court Proceedings, January 15, 1987	C 561
MOTION BY CHAMPAIGN NATIONAL BANK FOR DIRECTED VERDICT ON THE COUNTERCLAIM OF LANDERS SEED CO., INC. AT THE CLOSE OF COUNTERPLAINTIFF'S EVIDENCE, Filed January 15, 1987	C 563
MOTION BY CHAMPAIGN NATIONAL BANK FOR DIRECTED VERDICT ON THE COMPLAINT AT THE CLOSE OF DEFENDANT'S AND PLAINTIFF'S EVIDENCE, Filed January 15, 1987	C 565

INDEX 84-L-4 Continued

	Page No.
Court Proceedings, January 16, 1987	C 567
SUBPOENA, Filed January 21, 1987	C 569
Court Proceedings, January 21, 1987	C 571
Court Proceedings, January 22, 1987	C 573
PLAINTIFF'S JURY INSTRUCTIONS, Filed January 22, 1987	C 575
DEFENDANT'S JURY INSTRUCTIONS, Filed January 22, 1987	C 607
VERDICT OF THE JURY, Filed January 23, 1987	C 647
Court Proceedings, January 23, 1987	C 649
VOLUME IV	
POST-TRIAL MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO COUNT I OF THE COUNTERCLAIM, Filed February 17, 1987	C 651
Court Proceedings, February 18, 1987	C 655
NOTICE OF HEARING, Filed February 18, 1987	C 657
POST-TRIAL MOTION PURSUANT TO ILL. REV. CHAPTER 110 §§2-1201 and 2-1202, Filed February 18, 1987	C 660
NOTICE OF HEARING, Filed February 18, 1987	C 668
POST-TRIAL MOTION PURSUANT TO ILL. REV. STAT. CHAPTER 110 §§2-1201 and 2-1202, Filed February 18, 1987 (copy of previous motion?????)	C 671
Court Proceedings, February 19, 1987	C 679

INDEX 84-L-4 Continued

	Page No.
AMENDED POST-TRIAL MOTION FOR JUDGMENT NOT-WITH-STANDING THE VERDICT AS TO COUNT I OF THE COUNTERCLAIM, Filed February 23, 1987	C 681
Court Proceedings, February 24, 1987	C 687
Court Proceedings, March 16, 1987	C 689
NOTICE OF HEARING, Filed March 16, 1987	C 691
MEMORANDUM IN SUPPORT OF DEFENDANT'S POST-TRIAL MOTION, Filed March 16, 1987	C 694
Court Proceedings, March 18, 1987	C 705
MEMORANDUM, Filed March 18, 1987	C 707
NOTICE OF APPEAL, Filed April 14, 1987	C 712
Court Proceedings, April 15, 1987	C 717
AMENDED NOTICE OF APPEAL, Filed April 21, 1987	C 719
NOTICE OF CROSS-APPEAL, Filed April 21, 1987	C 724
Court Proceedings, April 22, 1987	C 729
MOTION PURSUANT TO ILL. REV. STAT. CHAPTER 110A §305(b) FOR STAY OF ENFORCEMENT PENDING APPEAL, Filed May 6, 1987	C 731
Court Proceedings, May 11, 1987	C 735
Court Proceedings, June 3, 1987	C 737
ORDER, Filed June 3, 1987	C 739

INDEX 84-L-4 Continued

	Page No.
DOCKET ENTRIES	C 742
CLERK'S CERTIFICATE	C 747
CLERK'S CERTIFICATE WITH JUDGE'S VERIFICATION	C 748
REPORT OF PROCEEDINGS, Filed June 9, 1987, VOLUME I through VOLUME IV, Pages 1-674, UNDER SEPARATE COVER	
PLAINTIFF'S EXHIBITS A through N	
DEFENDANT'S EXHIBITS 1 through 14	
MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO VACATE JUDGMENT BY CONFESSION (no date)	
CASE AUTHORITY CITED BY COUNSEL, Dated June 3, 1986	
CASE AUTHORITY CITED BY COUNSEL, Dated June 3, 1986	
CASE AUTHORITY CITED BY COUNSEL, Dated March 16, 1987	
JUDGMENT ORDER, Filed June 30, 1987	C 749
Court Proceedings, June 30, 1987	C 752
MOTION PURSUANT TO ILL. REV. STAT. CHAPTER 110A §305(b) FOR STAY OF ENFORCEMENT PENDING APPEAL, Filed July 2, 1987	C 754
NOTICE OF APPEAL, Filed July 2, 1987	C 761

INDEX 84-L-4 Continued

	Page No.
NOTICE OF HEARING, Filed July 2, 1987	C 764
NOTICE OF PRE-TRIAL HEARING, Filed July 6, 1987	C 767
Court Proceedings, July 6, 1987	C 770
NOTICE OF CROSS-APPEAL, Filed July 6, 1987	C 772
Court Proceedings, July 7, 1987	C 777
Court Proceedings, July 9, 1987	C 779
MANDATE, Filed August 5, 1987	C 781
Court Proceedings, August 6, 1987	C 784
DOCKET ENTRIES	C 786
CLERK'S CERTIFICATE	C 794
CLERK'S CERTIFICATE WITH JUDGE'S VERIFICATION	C 795

APPENDIX L

[603] MR. BISBEE: No, no, no, no.

THE COURT: Where are you?

MR. BISBEE: Fourth. I have three, first you may find, second, third. Those are the three things I have.

MR. EVANS: Let's go through those, John. Judge, the first option that John is suggesting is that the jury can find in favor of the bank and against Landers Seed Co. Favor of the bank on the bank's complaint and against Landers Seed Co. on its counterclaim. We don't have any problem with that. O.K., so the first is O.K. The second is you can find for Landers Seed Co. on their counterclaim and against the bank on its complaint. We don't have any problem with that. The third is you can find against both, you know, which basically is a form of a plague on both of your houses. Find against the bank on its complaint and you can also find against the company on its counterclaim. I am suggesting, Your Honor, there is a fourth and I have already drafted one. It says, fourth, you may find for the plaintiff, Champaign National Bank, on its complaint and also find for the defendant, Landers Seed Co. on its counterclaim. That's the reverse of a plague on both of your houses. In other words, it says if you are going to say, if you are going to give them the third option, then you have to give them the fourth one. The third one says you deserve each other, neither one of you can get anything. The fourth one is **[604]** let's put you back and John is submitting a damage instruction that is something like this and it is saying let's put you back where you would have been on July 1, 1983 when the bank started to liquidate you and so the fourth says you can find for the bank on its complaint and bring in a verdict of $750,000 and you can also find for the defendant, the corporation on its counterclaim. Bring in a verdict for them for whatever it is that their lost profits or whatever it is we are going to talk about in damages. If you are going to give the third, Judge, you have got

to give the fourth. I will tell you what, when you get to the forms of verdict, there is not going to be any instructions given telling them they are mutually exclusive. So if we are going to give the third, then we got to go ahead and give the fourth.

MR. BISBEE: The defendant strenuously objects to giving the fourth option for this reason. If the jury finds for the defendant on its affirmative defenses, it does not necessarily have to find any damages. It does not necessarily have to award any damages but if the jury finds on any one of the affirmative defenses, the bank doesn't recover. O.K. That's clear. The only way the defendant can keep the bank from recovering is by prevailing on one of the affirmative defenses. The affirmative defense and the counterclaim are exactly the same theories. Therefore, if the jury finds for the defendant **[605]** on any one of its counterclaims, there is no way that it can find for the bank on its complaint and against Landers Seed Company because if it finds for Landers Seed Company on any one of the counterclaims, it has necessarily by implication found for the seed company on one of the affirmative defenses and to allow the company, the seed company, to recover on the counterclaim and the bank to recover on its complaint which would mean that the seed company has not prevailed on the affirmative defenses would be absolutely inconsistent with the finding respecting the same elements on the counterclaim.

THE COURT: You are saying there could be no offset then?

MR. BISBEE: There could be no offset, Your Honor, absolutely not.

THE COURT: You have more to say on that?

MR. EVANS: No, I knew this was going to be a problem. That's why I specifically addressed this when we were visiting last Friday afternoon. I had already prepared some of my instructions and I just knew this was going to come up. I'm not sure that those are — I understand what John is saying.

THE COURT: I don't quite see why these would be inconsistent.

MR. BISBEE: Because, Your Honor, the affirmative defense of waiver corresponds to the counterclaim of breach of contract. The affirmative defense of estoppel corresponds to the counterclaim of fraud. The affirmative defense of bad faith dealing **[606]** corresponds to the counterclaim of bad faith dealing. If the jury finds for the seed company on the breach of contract theory, there is no way that it cannot find for the seed company on the waiver theory. Correspondingly, if the jury finds for the seed company on the counterclaim of fraud, there is no way it cannot find for the seed company on the affirmative defense of estoppel. Further, if the jury finds for the seed company on the counterclaim of bad faith dealing, which is a breach of contract type theory, there is no way it cannot find on the affirmative defense of bad faith dealing. The elements are so close. It would be absolutely inconsistent.

MR. EVANS: Your Honor, they all go to damages. It all goes to damages and the bottom line really comes down to what damage did the corporation, what evidence of any damages are there in this case that the corporation suffered on or about July 1, 1983. There was nothing left and, of course and the evidence clearly establishes that Charles had a new business entity and taken over the customers and was drawing twice as much salary and the Trisler operation, the Land Seed Co. So we are going to be arguing on every single thing that there can be no waiver, there can be no estoppel, there can be no bad faith dealing because the company just simply wasn't damaged. The damage to the company started arising back in 1981 and 1982 when Charles is — when Jan Haegen and John Hagen across the **[607]** street aren't shutting down his borrowing. That's when the damage has taken place. It had nothing to do with what Champaign National did on July 1st. Basically what the evidence indicates and this is what John and I have been fussing about, basically indicates that Charles was — after August 23rd

Charles was liquidating the company. You can look at the sales figures. You can look at the inventory figures. You can play whatever games you want to with Piranio's so-called valuation problem. That doesn't take care of the $600,000 differential in inventory. I am going to come at it very strong, Your Honor. I am not going to suggest they reach a compromise verdict. But I think clearly if you are going to give them the third option, they ought to have the fourth one and basically they ought to say a plague on all your houses because again John is submitting an instruction, his instruction which he has just handed me, which talks about if the breach had not occurred and this is contract law, Your Honor. John is correct on this. That is putting the parties back into the position they would have been in had the breach not occurred. Now this is what the jury can do, you see, and if the breach had not occurred, the alleged breach had not occurred, then what would the position they have been in. Basically July 1st they owe $750,000 or whatever it is, and you know, the company's maybe got some lost profits. Having option four in here gives them the chance to respond to this **[608]** contract approach and that's right in here about —

THE COURT: Now which one are you referring to?

MR. EVANS: I am talking about John is going to tender this instruction. It says, Your Honor, to the extent that actual damages have been so established by the evidence, you shall assess such actual damages a sum which will place it in the same economic position it would have been in had the contract been performed. O.K. Now if the contract had been performed, where would they have been on July 1, 1983? They still would have owed the million, two hundred thousand to the bank.

MR. BISBEE: Your Honor, if I may be heard. That misses the point. It absolutely misses the point. The jury can find for Landers Seed Company on the counterclaims, any one of them, and still not find any damages. That's what Mr. Evans really means to say, I respectfully submit. It can for on any one of the

counterclaims and not find any damages but if it finds for the seed company on any one of the counterclaims, its necessarily going to have to have found for the seed company on the corresponding affirmative defense or defenses in which case, the bank doesn't recover and the seed company doesn't recover. That's how that works but there is no way that the jury can find for the seed company on an affirmative defense and for the bank — pardon me, find for the seed company on counterclaim, **[609]** and find for the bank and against the seed company on the affirmative defenses. It just can't happen. It would be absolutely inconsistent and to put the fourth option in there would be just to invite the jury into two things, both of which are bad. Confusion and error and you don't want that. Mr. Evans does not lose a thing by leaving out the fourth option except a longer time while the jury tries to figure out what on earth it means because it just means nothing.

MR. EVANS: With all due respect, Your Honor, the affirmative defense of waiver is not an identical theory or even an analogous theory to the counterclaim of breach of contract.

MR. BISBEE: Yes, but it is.

MR. EVANS: We started with that this morning.

THE COURT: I could see where this could very well be critical but I believe the plaintiff is right on this one, gentlemen. I think it should be in there. I will so rule. The rest of this have to be done over? That's 13.

MR. BISBEE: Jim, I really urge you to withdraw that. It is really going to be confusing. It doesn't redound to anybody's benefit. It's just going to screw things up.

MR. EVANS: In what way do you think it is going to screw it up?

MR. BISBEE: It's just going to be confusing to the jury. **[610]** There is no profit in it for anyone. I say this all spirit of

advocacy aside and I say it simply in the sense of presenting a streamlined matter to the jury. If I don't prevail on my affirmative defenses, I am out. I am out. If they find for me on the counterclaim, if they found I implicitly I don't prove damages, that's the deal. I can live with that. But there is no way they can find for me on the counterclaim and not on the affirmative defense.

MR. EVANS: I disagree with that. I think the jury is quite capable of doing that. I appreciate your position, John. With respect to Defendant's instruction 13, I am objecting to it because it under little b. Estoppel and also under Count II involving the fraud, there is reference made to the payment of the $500,000. The Judge has previously ruled on that but I want to note those objections for the record. And Shirley, only for those reasons. But other than those, Judge, I don't have any objections.

MR. BISBEE: Defendant's 14.

THE COURT: Given.

MR. BISBEE: Defendant's 15.

THE COURT: Denied.

MR. BISBEE: Defendant's 16.

MR. EVANS: I object to this.

THE COURT: Denied. 17 given.

APPENDIX LL

In this suit, there is not only the Complaint of the Plaintiff Champaign National Bank but also a Counterclaim by the Defendant, Landers Seed Co. Inc.

Because there is a Counterclaim in this case, you may reach one of any one of four results.

First, you may find for the Plaintiff on its Complaint and against the Defendant on its Counterclaim.

Second, you may find for the Defendant on any one or all the counts of its Counterclaim and against the Plaintiff on its Complaint, or

Third, you may find against both, the Plaintiff on its Complaint and the Defendant on its Counterclaim.

Fourth, you may find in favor of both the Plaintiff on its Complaint and the Defendant on any one or all counts of its Counterclaim.

In order for the Plaintiff to recover, it has the burden of proving each of the following propositions:

First, that the Defendant Landers Seed Co. Inc. executed a promissory note dated December 21, 1982. The Defendant Landers Seed Co. Inc. has admitted this and it need not be proved by Champaign National Bank;

Second, that Landers Seed Co. Inc. delivered that note dated December 21, 1982 to Champaign National Bank. The Defendant Landers Seed Co. Inc. has admitted this and it need not be proved by Champaign National Bank.

Third, that the Champaign National Bank gave consideration for the promissory note dated December 21, 1982 executed by Landers Seed Co. Inc. The Defendant Landers Seed Co. Inc. has admitted this and it need not be proved by Champaign National Bank;

Fourth, that the Champaign National Bank owns the promissory note dated December 21, 1982. The Defendant Landers Seed Co. Inc. has admitted this and it need not be proved by Champaign National Bank; and

Fifth, that 724, 637.37 remains due and owing to Champaign National Bank from Landers Seed Co. Inc. on said note.

Landers Seed Co. Inc. has the burden of proving each of the propositions in any one of the following defenses of waiver, estoppel, or bad faith dealing to avoid liability to the bank on the promissory note.

a. Waiver:

First, that Champaign National Bank agreed to work with Landers Seed Co. Inc. and not to attempt to collect on the promissory notes as long as Landers Seed Co. Inc. was making reasonable progress toward profitability, or so long as there was a chance that Landers Seed Co. Inc. would attain profitability, which could take up to three years and so long as Landers Seed co. Inc. paid interest on notes as they became due;

Second, that by so entering into that agreement, Champaign National Bank agreed to delay enforcing its rights under the promissory notes of August 23, 1982 and December 21, 1982;

Third, that by reason of both the above, Champaign National Bank knowingly and voluntarily agreed to delay enforcing its rights under the promissory notes.

b. Estoppel:

First, that Champaign National Bank misrepresented to Landers Seed Co. Inc. that the Bank was going to work with Landers Seed Co. Inc. as long as Landers Seed Co. Inc. made reasonable progress toward profitability or so long as there was a reasonable chance that Landers Seed Co. Inc. would attain profitability, a period which could take up to three years, and the Bank knew that representation was untrue.

Second, that Landers Seed Co. Inc. reasonably relied on the bank's misrepresentation by Landers Seed Co. Inc. executing promissory notes in favor of the Champaign National Bank dated August 23, 1982 and December 21, 1982, executing a security agreement in favor of Champaign National Bank, causing Glen and Maxine Landers to execute a mortgage in favor of Champaign National Bank, causing Glen Landers, Charles Landers, Maxine Landers, and Lorelyn Landers to execute personal guaranties in favor of Champaign National Bank, causing payment to be made to the Champaign Natioanl Bank in the approximate amount of $500,000.00, and made reasonable progress toward attaining profitability;

Third, that Landers Seed Co. Inc., by doing those things materially changed its position;

Fourth, that the change in position was to Landers Seed Co. Inc.'s detriment.

c. Bad faith dealing:

First, that Champaign National Bank made agreements and representations that it would work with Landers Seed Co. Inc. and delay enforcing its right on any promissory notes so long as Landers Seed Co. Inc. was making reasonable progress toward profitability and so long as there was a reasonable chance that Landers Seed Co. Inc. would attain profitability and so long as Landers Seed Co. Inc. paid the interest on notes as they became due, a period which could take up to three years.

Second, that Champaign National Bank failed to use reasonable judgment in determining whether or not Landers Seed Co. Inc. was making reasonable progress toward profitability by July, 1983;

Third, that in so failing to use reasonable judgment to determine whether or not Landers Seed Co. Inc. was making reasonable progress toward profitability, Champaign Natioanl Bank caused the liquidation of Landers Seed Co. Inc. on or before July 5, 1983.

If you find from your consideration of all the evidence that each of the propositions required of the Plaintiff has been proved and that none of the Defendant's Affirmative Defenses has been proved, then your verdict should be for the Plaintiff. If, on the other hand, you find from your considerations of all the evidence, that any one of the propositions that Plaintiff is required to prove has not been proved, or that any one of the Defendant's Affirmative Defenses has been proved, then your verdict should be for the Defendant.

In order for Landers Seed Co. Inc. to recover on its Counterclaim, it has the burden of proving each of the following propositions in any one of the three counts:

a. Count I (Breach of Oral Contract):

First, that Champaign National Bank agreed to work with Landers Seed Co. Inc. and delay enforcing its rights on the promissory notes so long as Landers Seed Co. Inc. was making reasonable progress toward profitability, or so long as there was a chance that Landers Seed Co. Inc. would attain profitability ans so long as Landers Seed Co. Inc. paid the interest on the notes as they became due, a period which could take up to three years.

Second, that Landers Seed Co. Inc. paid consideration for this agreement by executing the notes of August 23, 1982 and December 21, 1982 directly payable to Champaign National Bank, caused Glen and Maxine Landers to execute a mortgage in favor of Champaign National Bank to property that Glen and Maxine Landers owned, caused Glen Landers, Charles Landers, Maxine Landers, and Lorelyn Landers to execute personal guaranties in favor of Champaign National Bank, paid interest on the August 23, 1982 note and the December 21, 1982 note as they became due, and made reasonable progress toward profitability.

Third, that Champaign National Bank nonetheless caused the liquidation of Landers Seed Co. Inc. on or about July 5, 1983

notwithstanding its agreement to work with Landers Seed Co. Inc. as above described.

Fourth, the Defendant Landers Seed Co. Inc. was damaged as a result of the Bank's actions.

b. Count II (Fraud):

First, that Champaign National Bank caused Landers Seed Co. Inc. to enter into the notes of August 23, 1982 and December 21, 1982 by misrepresenting to Landers Seed Co. Inc. that the Bank was going to work with Landers Seed Co. Inc. as long as Landers Seed Co. Inc. made reasonable progress toward profitability or so long as there was a reasonable chance that Landers Seed Co. Inc. would attain profitability and so long as Landers Seed Co. Inc. paid the interest on the notes as they became due, a period which take up to three years and the Bank knew this representation was untrue.

Second, that in reliance on this misrepresentation, Landers Seed Co. Inc. executed promissory notes in favor of the Champaign National Bank dated August 23, 1982 and December 21, 1982, executed a security agreement in favor of Champaign National Bank, caused Glen and Maxine Landers to execute a mortgage in favor of Champaign National Bank, caused payment to be made to the Champaign National Bank in the approximate amount of $500,000.00 and made reasonable progress toward attaining profitability.

Third, Champaign National Bank, disregarding its representation that it would work with Landers Seed Co. Inc., caused the liquidation of Landers Seed Co. Inc. on or about July 5, 1983.

Fourth, the Defendant Landers Seed Co. Inc. was damaged as the direct and proximate result of the Bank's actions.

c. Count III (Bad Faith Dealing):

First, Champaign National Bank made agreements and representations that it would work with Landers Seed Co. Inc. and delay enforcing its rights on any promissory notes so long as Landers Seed Co. Inc. was making reasonable progress toward profitability or so long as there was a reasonable chance that Landers Seed Co. Inc. would attain profitability and so long as Landers Seed Co. Inc. paid interest on notes as they became due, a period which could take up to three years.

Second, that Champaign National Bank failed to use reasonable judgment in determining whether or not Landers Seed Co. Inc. was making reasonable progress toward profitability by July, 1983;

Third, that in so failing to use reasonable judgment to determine whether or not Landers Seed Co. Inc. was making reasonable progress toward profitability, Champaign National Bank caused the liquidation of Landers Seed Co. Inc. on or before July 5, 1983.

Fourth, that Defendant Landers Seed Co. Inc. was damaged as a result of the Bank's actions.

If you find from your consideration of all the evidence that each of these propositions has been proved as to any one or more of the three counts of Defendant's Counterclaim, then your verdict should be for the Defendant as to its Counterclaim. On the other hand, if you find from your consideration of all the evidence that any one of these propositions has not been proved as to any of the Counts in Defendant's Counterclaim, then your verdict should be for the Plaintiff as to the Defendant's Counterclaim.

Forms of verdict are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it into court. The verdict should be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

If you find for Champaign National Bank and against Landers Seed Co. Inc. on the counterclaim, then you should use the form of verdict which says:

> "We the Jury find for Champaign National Bank and against Landers Seed Co. Inc. on Champaign National Bank's complaint. We assess damages for the sum of $724,637.37."

If you find for Landers Seed Co. Inc. and against Champaign National Bank on Champaign National Bank's complaint and find for Landers Seed Co. Inc. and against Champaign National Bank on Landers Seed Co. Inc.'s counterclaim, then you should use the form which says:

> "We the Jury, find against Champaign National Bank and for Landers Seed Co. Inc. on the Champaign National Bank's complaint. We further find for Landers Seed Co. Inc. and against Champaign National Bank on Count(s) _____ of Landers Seed Co. Inc.'s Counterclaim. (Specify one or more counts). We assess Landers Seed Co. Inc.'s damages on its counterclaim in the sum of $_____."

If you find for Landers Seed Co. Inc. and against Champaign National Bank on Champaign National Bank's complaint and if you find for Champaign National Bank and against Landers Seed Co. Inc.'s counterclaim, then you should use the form of verdict which says:

> "We, the Jury, find for Landers Seed Co. Inc. and against Champaign National Bank on Champaign National Bank's complaint. We further find against Landers Seed Co. Inc. and for Champaign National Bank on Landers Seed Co. Inc.'s counterclaims."

If you find for Champaign National Bank on its complaint against Landers Seed Co. Inc. and for Landers Seed Co. Inc. on any one or more of the Counts of its counterclaim, then you should use the form of verdict which says:

"We, the Jury, find for Champaign National Bank and against Landers Seed Co. Inc. on the complaint of Champaign National Bank and assess damages in the sum of $724,637.37.

"We, the Jury, further find for Landers Seed Co. Inc. on Count(s) _____ of Landers Seed Co. Inc.'s counterclaim (specify one or more counts). We assess Landers Seed Co. Inc.'s damages on its counterclaim in the sum of $ _____."

APPENDIX M

VERDICT

We, the Jury find for Champaign National Bank and against Landers Seed Co. Inc. on the complaint of Champaign National Bank and assess damages in the sum of $724,637.37.

We, the Jury, further find for Landers Seed Co. Inc. on Count(s) I of Landers Seed Co. Inc.'s counterclaim (specify one or more counts). We assess Landers Seed Co. Inc.'s damages on its counterclaim in the sum of $60,833.31.

/s/ illegible
/s/ illegible
/s/ illegible
/s/ illegible
/s/ illegible
/s/ illegible

APPENDIX N

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL DISTRICT
MOULTRIE COUNTY, ILLINOIS

No. 84-L-4

The Champaign National Bank,
a National Banking Association,
Plaintiff and Counterdefendants,

vs.

Landers Seed Co., Inc., Charles Landers,
Glen Landers, Maxine Landers, and Lorelyn Landers,
Defendants and Counterplaintiffs.

POST-TRIAL MOTION PURSUANT TO ILL. REV. STAT. CHAPTER 110 §§2-1201 AND 2-1202

Defendant and Counterplaintiff Landers Seed Company, by its attorneys, hereby moves the Court to enter an order (a) amending the verdict so as to reflect the intent of the jury by entering judgment in favor of Landers Seed Company in the amount of $60,833.31, or (b) entering judgment notwithstanding the verdict in favor of Landers Seed Company in the anount of $60,833.31, or (c) in the alternative, granting Landers a new trial. As reason for so moving, said Defendant and Counterpalintiff states as follows:

A. Amendment of Verdict Pursuant to *Ill. Rev. Stat.* Chapter 110 §2-1201

1. The jury was instructed that the Defendant and Counterplaintiff Landers had the burden of proving each of the following propositions to establish the defense of waiver to the Bank's Complaint on its notes:

First, that Champaign National Bank agreed to work with Landers Seed Company and not to attempt to collect

on the promissory notes so long as Landers Seed Co. Inc. was making reasonable progress toward profitability, or so long as there was a chance that Landers Seed Co. Inc. would attain profitability, which could take up to three years and so long as Landers Seed Co. Inc. paid the interest on the notes as they became due;

Second, that by so entering into that agreement, Champaign National Bank agreed to delay enforcing its rights under the promissory notes of August 23, 1982 and December 21, 1982;

Third, that by reason of both the above, Champaign National Bank knowingly and voluntarily agreed to delay enforcing its rights under the promissory notes.

2. Additionally the jury was instructed that Landers Seed Company had the burden of establishing each of the following propositions in order to establish Count I of its Counterclaim alleging breach of oral contract:

First, that Champaign National Bank agreed to work with Landers Seed Company and delay enforcing its rights on the promissory notes so long as Landers Seed Co. Inc. was making reasonable progress toward profitability, or so long as there was a chance that Landers Seed Co. Inc. would obtain profitability and so long as Landers Seed Company paid interest on the notes as they became due, a period which could take up to three years;

Second, that Landers Seed Company paid consideration for this agreement by executing the notes of August 23, 1982 and December 21, 1982 directly payable to the Champaign National Bank, executed security agreements in favor of Champaign National Bank, caused Glen and Maxine Landers to execute a mortgage in favor of Champaign National Bank to property that Glen and Maxine Landers owned, caused Glen Landers, Charles Landers,

Maxine Landers, and Lorelyn Landers to execute personal guaranties in favor of Champaign National Bank, paid interest on the August 23, 1982 note and Cecember 21, 1982 note as it became due, and made reasonable progress toward profitability;

Third, that Champaign National Bank nonetheless caused the liquidation of Landers Seed Company on or about July 5, 1983 notwithstanding its agreement to work with Landers Seed Company as above described;

Fourth, that Landers Seed Company was damaged as a result of the Bank's actions.

3. That, moreover, Lander's First Affirmative Defense alleging waiver set forth verbatim the same allegations as did Count I of its Counterclaim alleging breach of contract in the Answer and Counterclaim filed by Landers to the Bank's Complaint.

4. The jury signed Verdict Form No. 4 which permitted the Champaign National Bank to recover on its promissory note, but als found for Landers Seed Company on Count I of its Counterclaim alleging breach of oral contract.

5. Nonetheless, the jury, by finding for Defendant and Counterplaintiff Landers Seed Company respecting Count I of its counterclaim, breach of oral contract, necessarily found for Landers Seed Company on its First Affirmative Defense of waiver for the reason that all elements of the breach of contract count of the Counterclaim necessarily include within them the elements of waiver which is a complete defense to the Bank's Complaint on the note.

6. Inasmuch as all elements of Landers' Affirmative Defense of waiver to the Bank's Complaint are necessarily included within Landers' breach of contract count of its Counterclaim, the jury's finding in favor of Landers' breach of contract count necessarily means as a matter of logic and law that the jury found in favor of Landers on its affirmative defense of waiver,

by reason of which, the verdict should be amended to reflect that the jury found for Landers and against Champaign National Bank on Champaign National Bank's Complaint as well as having found for Landers and against Champaign National Bank on Count I of Landers' Counterclaim.

7. By reason of all the foregoing, the Court should amend the verdict and enter judgment thereon to reflect judgment in favor of Landers Seed Company in the amount of $60,833.31 so as to conform to the obvious intent of the jury manifested by its verdict in favor of Landers Seed Company on Count I of Landers' Counterclaim, which count of the Counterclaim necessarily includes within it all elements of the affirmative defense of waiver to the Bank's complaint.

B. Judgment Notwithstanding the Verdict Pursuant to *Ill. Rev. Stat.* Chapter 110 §2-1202.

1. When all the evidence, together with all reasonable inferences therefrom are viewed in the aspect most favorable to the Plaintiff Bank, evidence so overwhelmingly favors the Defendant Landers respecting its First Affirmative Defense of waiver to the Bank's Complaint, that no verdict for the Bank on its Complaint can stand.

2. The jury's verdict for the Defendant and Counterplaintiff Landers on Count I of Landers' Counterclaim (breach of contract) establishes that the evidence and all inferences drawn therefrom viewed in its aspect most favorable to the Bank so overhelming favors Defendant Landers respecting the affirmative defense of waiver to the Bank's Complaint, that no verdict for the Bank on its Complaint can stand.

3. That in both the foregoing respects, the evidence in the case at bar together with all reasonable inferences therefrom viewed in its aspect most favorable to the Plaintiff Bank, as found by the jury respecting Landers' breach of contract count, so overwhelmingly establshes that the Bank (i) agreed to work

with Landers Seed Company and not to attempt to collect on the promissory notes of August 23, 1982 and December 21, 1982 (ii) so long as Landers Seed Company was making reasonable progress toward profitability or (iii) so long as there was a chance that Landers Seed Company would attain profitability, a period which could take up to three years, and (iv) so long as Landers Seed Company paid the interest on the notes as they became due, and (v) that by so entering into that agreement, the Champaign National Bank voluntarily agreed to delay enforcing its rights under the promissory notes of August 23, 1982 and December 21, 1982, all of which elements establish Landers' affirmative defense of waiver to the Bank's Complaint, thereby requiring entry of judgment for Landers, notwithstanding the verdict as entered.

C. New Trial Pursuant to *Ill. Rev. Stat.* Chapter 110 §2-1202.

1. The trial court erred in instructing the jury over Defendant and Counterplaintiff Landers' objection that the jury could enter a verdict in favor of both the Champaign National Bank on its Complaint and Landers Seed Company on its Counterclaim in that such instruction necessarily permitted the jury to render inconsistent verdicts irrespective of which count or counts the jury might have found for Landers on its Counterclaim in that the theories alleged in Counts I through III of the Counterclaim necessarily corresponded to and contained the same essential elements as the theories alleged in the First through Third Affirmative Defenses respectively to the Bank's Complaint.

2. The trial court erred in giving to the jury, over the Defendant and Counterplaintiff's objection, a verdict form which permitted a finding both for the Bank on its Complaint and Landers Seed Company on its Counterclaim in that said verdict form necessarily permitted, indeed invited the jury to render an inconsistent verdict in that the first three affirmative defenses necessarily corresponded to the first three counts of the

Counterclaim respectively, necessarily meaning that a finding for Landers on any one of the counts of its Counterclaim would necessarily be inconsistent with the corresponding affirmative defense and, in this case a finding for Landers on Count I of its Counterclaim alleging breach of contract is necessarily inconsistent with the verdict apparently finding against Landers respecting its first affirmative defense waiver.

3. That, moreover, the verdict in fact rendered by the jury in favor of the Bank and against Landers Seed Company on the Bank's Complaint and for Landers Seed Company and against the Bank on Landers Seed Company's Counterclaim alleging breach of contract is necessarily inconsistent in that the jury finding for Landers Seed Company on its breach of contract count is necessarily inconsistent as a matter of law and logic with its verdict against Landers Seed Company respecting Landers' affirmative defense of waiver, and the two verdicts cannot be reconciled with each other, by reason of which it is impossible to determine the jury's intent.

4. That, last, the verdict for the Bank on its Complaint and against Landers Seed Company on the Bank's Complaint is against the preponderance of the evidence in view of (i) all the evidence adduced by the Defendant on all elements of its First Affirmative Defense of waiver to the Bank's Complaint which evidence overwhelmingly shows that all elements of Landers' waivre defense have been proved and (ii) the foregoing fact is evidenced by the jury having found for the Defendant Landers Seed Company on Count I of its Counterclaim, breach of contract, which Count necessarily included all elements of the affirmative defense of waiver to the Bank's Complaint.

WHEREFORE, Defendant and Counterplaintiff Landers Seed Company prays the Court to enter an order (a) amending the verdict so as to reflect the intent of the jury by entering judgment in favor of Landers Seed Company in the amount of $60,833.31, or (b) entering judgment notwithstanding the ver-

dict in favor of Landers Seed Company in the amount of $60,833.31, or (c) in the alternative, granting Landers a new trial for the reasons aforesaid.

Respectfully submitted:

LAW OFFICES OF
JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

By: /s/ John H. Bisbee

DATED: February 17, 1987

APPENDIX O

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
MOULTRIE COUNTY, ILLINOIS

NO. 84-L-4

THE CHAMPAIGN NATIONAL BANK,
A National Banking Association,
Plaintiff & Counterdefendant,

vs.

LANDERS SEED CO., INC.,
Defendant & Counterplaintiff.

AMENDED POST-TRIAL MOTION FOR JUDGMENT NOTHWITHSTANDING THE VERDICT AS TO COUNT I OF THE COUNTERCLAIM

NOW COMES THE CHAMPAIGN NATIONAL BANK, Plaintiff and Counterdefendant, by its attorneys, EVANS & FROEHLICH, and, pursuant to Section 2-1202 of the Illinois Code of Civil Practice, prays that this Court enter an Order vacating and setting aside the Verdict returned by the Jury as to Count I of the Counterclaim and to find and enter Judgment in favor of the Counterdefendant, CHAMPAIGN NATIONAL BANK, notwithstanding the Verdict and, in support thereof, states as follows:

1. Count I of the Counterclaim involved an alleged breach of contract by the Bank with respect to an oral agreement preceding the execution of numerous written loan documents by the counterplaintiff, LANDERS SEED CO., INC. The evidence adduced by the Counterplaintiff during the Trial clearly and unequivocally indicated that all of the conversations between the parties alleged to constitute an oral contract occurred prior to the execution by Counterplaintiff of loan documents specifically containing contrary terms. Therefore, all evidence

pertaining to the alleged oral agreement was barred from introduction by the parol evidence rule and should have been excluded from consideration by the Jury. Similarly, no exception to the parol evidence rule exists as there were no factual issues raised concerning conditional delivery or ambiguity, and fraudulent misrepresentation could not exist as a matter of law according to a Jury Instruction given by the Court.

2. The evidence offered by the Counterplaintiff in support of its claim for damages as to Count I of the Counterclaim was legally insufficient to sustain the Verdict of the Jury. The damage evidence presented by Counterplaintiff was remote, speculative and not reasonably related to restoring the Counterplaintiff to the position it would have had if the alleged oral contract had been fully performed by the Bank. Also, the Counterplaintiff failed to produce any evidence indicating that the damages sustained by Counterplaintiff were reasonably forseeable by the Bank or that the actual failure of Counterplaintiff's business was proximately caused by the Bank's breach of the alleged oral agreement. To the contrary, the evidence clearly indicated that the Counterplaintiff was hopelessly insolvent as of June 30, 1983 which was immediately prior to the time that the Bank allegedly breached the oral agreement.

3. The Jury's Verdict in favor of the Counterplaintiff, LANDERS SEED CO., INC. on Count I of the Counterclaim was inconsistent with the evidence and the Jury Instructions which were given. More specifically, the Court gave Defendant's Instruction No. 23 over the objection of Plaintiff which read as follows:

> If you find in favor of Landers Seed Co., Inc. on its claim of breach of contract or bad faith dealing, then you must assess its damages, which may be actual or nominal.
>
> To assess any actual damages, you must find from a preponderance of the evidence that Landers Seed Co., Inc.

sustained actual damages as a result of the breach or bad faith dealing, and the amount thereof.

To the extent that actual damages have been so established by the evidence, you shall assess as such actual damages a sum which will place it in the same economic position it would have been in had the contract been performed or had the bank not been guilty of bad faith dealing. This involves an award of both the losses caused and the gains prevented by the Bank's breach including (a) an amount sufficient to restore its customer base, (b) an amount sufficient to satisfy the on-going expenses of Landers Seed Co., Inc. from July 1, 1983 including interest owed to banks and lease payments.

If you find in favor of Landers Seed Co., Inc., but do not find any actual damages, you shall nonetheless award it nominal damages in the sum of one dollar.

By this instruction, the Jury was specifically informed that it could only assess ". . . actual damages a sum which will place it in the same economic position it would have been in had the contract been performed . . .". In this context, LANDERS SEED CO., INC. introduced into evidence its Financial Statement dated July 11, 1983 for the fiscal year ending June 30, 1983 — a date within one week of the time of the Bank's alleged breach of contract on July 5, 1983. That Exhibit which was submitted to the Jury, along with a Financial Data Summary prepared by the Company's accountant for the fiscal year ends of 1981, 1982 and 1983, clearly and unequivocally established that the Company was insolvent as of June 30, 1983, with absolutely no working capital and no stockholder's equity remaining in the Company at that time. Therefore, the alleged breach of Contract by the Bank on July 5, 1983 could not have been the proximate cause of any damage to the "economic position" of the Company.

4. The Court erred by giving the aforementioned Jury Instruction (Defendant's No. 23) over the objection of the Bank in

that it improperly permitted the Jury to consider specific items of damages as to which no evidence was submitted by the Counterplaintiff (Company) and which were not appropriate items of contract damages to be considered by the Jury.

Wherefore, CHAMPAIGN NATIONAL BANK, Plaintiff and Counterdefendant, prays that this Court enter an Order vacating and setting aside the Verdict returned by the Jury as to Count I of the Counterclaim and to find and enter Judgment in favor of the Counterdefendant, CHAMPAIGN NATIONAL BANK, notwithstanding the Verdict.

CHAMPAIGN NATIONAL BANK
Plaintiff and Counterdefendant

BY: /s/ James W. Evans
ONE OF ITS ATTORNEYS

JAMES W. EVANS; LTD.
EVANS & FROEHLICH
Attorneys at Law
44 Main St., P.O. Box 737
Champaign, IL 61820
Telephone: 217-359-6494

APPENDIX P

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL DISTRICT
MOULTRIE COUNTY, ILLINOIS

NO. 84-L-4

THE CHAMPAIGN NATIONAL BANK,
a National Banking Association,
Plaintiff-Appellee,

vs.

LANDERS SEED CO., INC., CHARLES LANDERS,
GLEN LANDERS, MAXINE LANDERS,
and LORELYN LANDERS,
Defendants-Appellants.

NOTICE OF APPEAL

Notice is hereby given that the Defendant-Appellant Landers Seed Co., Inc. hereby appeals to the Illinois Appellate Court for the Fourth Judicial District from the Circuit Court of the Sixth Judicial Circuit, Moultrie County, Illinois from that final Judgment Order entered June 30, 1987.

Respectfully Submitted:

LAW OFFICES OF
JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

BY /s/ JOHN H. BISBEE

DATED: July 1, 1987

CERTIFICATE OF MAILING

I certify that I have on this 1st day of July, 1987, deposited a true and correct copy of the foregoing NOTICE OF APPEAL in the United States mails, postage prepaid to Mr. James W. Evans, Evans & Froehlich, 44 Main Street, P.O. Box 737, Champaign, Illinois 61820.

/s/ JOHN S. BISBEE

APPENDIX Q

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL DISTRICT
MOULTRIE COUNTY, ILLINOIS

NO. 84-L-4

CHAMPAIGN NATIONAL BANK,
a National Banking Association,
Plaintiff-Appellee, Cross-Appellant,

vs.

LANDERS SEED CO., INC., CHARLES LANDERS,
GLEN LANDERS, MAXINE LANDERS,
and LORELYN LANDERS,
Defendants-Appellants, Cross-Appellees.

NOTICE OF CROSS-APPEAL

Notice is hereby given that the Plaintiff-Appellee-Cross Appellant, THE CHAMPAIGN NATIONAL BANK, hereby cross-appeals to the Illinois Appellate Court for the Fourth Judicial District from the Circuit Court of the Sixth Judicial Circuit, Moultrie County, Illinois from that final Judgment Order entered June 30, 1987.

Respectfully Submitted:

James W. Evans, Ltd.
EVANS & FROEHLICH
Attorneys at Law
44 Main St., P.O. Box 737
Champaign, Illinois 61820
Telephone: 217-359-6494

BY: /s/ JAMES W. EVANS, LTD.

DATED: July 2, 1987

APPENDIX R

No. 4-87-0460

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

THE CHAMPAIGN NATIONAL BANK,
a National Banking Association,
Plaintiff-Appellee-Cross-Appellant,

vs.

LANDERS SEED CO., INC.,
Defendant-Appellant-Cross-Appellee.

Appeal from the Circuit Court of the
Sixth Judicial Circuit, Moultrie County
Case No. 84-L-4

Honorable W. B. KRANZ
Judge Presiding

**BRIEF AND APPENDIX OF
PLAINTIFF-APPELLEE-CROSS APPELLANT**

JAMES W. EVANS, LTD.
EVANS & FROELICH
Attorneys for Plaintiff-
Appellee-Cross-Appellant
44 Main Street
P.O. Box 737
Champaign, IL 61820
Telephone: 217-359-6494

ORAL ARGUMENT REQUESTED

EXHIBIT "C"

No. 4-87-0460

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

THE CHAMPAIGN NATIONAL BANK,
a National Banking Association,
Plaintiff-Appellee,

vs.

LANDERS SEED CO., INC.,
Defendant-Appellant.

Appeal from the Circuit Court of the
Sixth Judicial Circuit, Moultrie County
Case No. 84-L-4

Honorable W. B. Kranz
Judge Presiding

POINTS AND AUTHORITIES

A. The Trial Court Erred By Permitting The Jury To Hear Certain Testimony In Violation Of The Rule Prohibiting Parol Evidence 13

Main Bank of Chicago v. Baker, 86 Ill. 2d 188, 427 N.E. 2d 94 (1981) 16

B. The Trial Court Erred In Not Vacating The Verdict Of The Jury As To Count I Of The Counterclaim Due To The Insufficiency Of The Evidence In Establishing That The Bank's Breach Of Contract Caused The Failure Of Landers Seed Co., Inc. 19

C. The Trial Court Erred By Giving Defendant's Instruction No. 23 Which Allowed The Jury To Consider Inappropriate Items Of Contract Damages 20

Central Information Financial Services, Ltd. v. First National Bank of Decatur, 128 Ill. App. 3d 1052, 471 N.E. 2d 992 (4th Dist. 1984) 20

D. The Trial Court Did Not Err In Denying The Post Trial Motions Of Landers Seed Co., Inc. 21

Conclusion 22

EXHIBIT "C"

STATEMENT OF THE ISSUES

I. Did the Circuit Court err in refusing to grant Bank's post-trial motion pursuant to *Ill. Rev. Stat.* Chapter 110 § 2-1202 to vacate and set aside the verdict returned by the Jury in favor of Landers Seed Co., Inc. and against the Bank as to Count I of the Counterclaim in the amount of $60,833.31 for the following reasons:

A. That all of Landers Seed Co., Inc.'s evidence supporting an alleged breach of oral contract by C.N.B. or a waiver by of rights by the Bank was barred from introduction by the rule prohibiting parol evidence and should have been excluded from consideration by the Jury?

B. That the evidence offered by Landers Seed Co., Inc. in support of its claim for damages was legally insufficient to sustain the verdict of the Jury in that it was inadequate to establish that the failure of Landers Seed Co., Inc.'s business was proximately caused by the Bank's breach of the alleged oral contract?

C. That the Jury was given Defendant's Instruction No. 23, over the objection of the Bank, and said Instruction improperly permitted the Jury to consider inappropriate items of contract damages?

STATEMENT OF RELEVANT FACTS

The Champaign National Bank, Appellee and Cross-Appellant, generally concurs in the Statement of Relevant Facts provided by Appellant except for the following:

1. Charles Landers became President of Landers Seed Co., Inc. in 1976 or 1977 and was the chief operating officer of the business. T-116. His parents, Glen and Maxine Landers became less involved with the business at that time. T-116. In 1977, the Company had no debt. T-289.

2. Prior to August 23, 1982, the Champaign National Bank was not a lender to Landers Seed Co., Inc. T-28. All of the Company's loans were obtained directly from the First National Bank of Sullivan which subsequently participated most of them to other banks, particularly Champaign National. T-25, 26.

3. As of June 30, 1981, Landers Seed Co., Inc., had $900,000 outstanding in Bank debt. Plaintiff's Exhibit H. As of June 30, 1982, the Company had $1,700,000 outstanding in Bank loans. Defendant's Exhibit No. 13 at Page 2. All of these loans were personally guaranteed by Glen Landers, Maxine Landers, Charles Landers and Lorelyn Landers who had guaranty agreements on file with the First National Bank of Sullivan. T-276. These loans were unsecured as the Sullivan Bank had not required the pledge of any collateral. T-40, T-41.

4. In September of 1981, Lee O'Neill, a Vice President of Champaign National Bank, accompanied by Jan Haegen, an officer of the Sullivan Bank, visited with Charles Landers at the offices of Landers Seed Co., Inc. T-344. Charles Landers indicated that the Company would need to borrow more money which he estimated might be as much as 1.2 million dollars.

T-345. At that time, Charles Landers indicated that he anticipated Company profits would be in excess of $50,000 for the fiscal year ending June 30, 1982. T-345. The Banks funded the requested loans and had in excess of one million dollars in outstanding debt due from the Company as of April, 1982. T-346.

5. In April of 1982, Charles Landers sought to borrow an additional $700,000 on behalf of the Company. T-127. At that time, Charles indicated that the Company would sustain a "loss" of $100,000 for the fiscal year ending June 30, 1982, as compared to a loss of $63,343 for the previous fiscal year. T-348. The Banks agreed to fund only $200,000 of the requested borrowing, with the Sullivan Bank making the loan and participating it to Champaign National. T-347.

6. In early August of 1982, Champaign National Bank received a Compilation Report prepared by the Company's accountant indicating that the "loss" for the fiscal year ending June 30, 1982 was actually $378,551, T-286, and further indicating that there was a significant disagreement between the accountant and the Company as to the manner in which inventory was to be valued — a variance which would have possibly increased the "loss" by an additional $416,000. T-283. The report also indicated that the Company's current liabilities exceeded its current assets by $478,952, that stockholders equity was a negative $394,670 and that Company might be unable to continue in existence. Defendant's Exhibit 14.

7. After receiving this information, Champaign National made a decision to re-structure the $1,200,000 of outstanding debt that had previously been participated to it. T-352. Champaign National decided to deal directly with Landers Seed Co., Inc. and would require that the corporate loans be secured with collateral which included assets of the business and mortgages on certain real estate owned by Glen and Maxine Landers. T-357, T-360. In addition, Champaign National would further require that the personal guarantees of Glen, Maxine, Charles

and Lorelyn Landers be made directly to the Champaign National Bank. T-359, T-360. The Bank also agreed to capitalize $81,726.83 of accrued interest which was then outstanding into the principal balance of the re-structured loan, as the Company was unable to pay it. T-356.

8. In August 23, 1982, a meeting was held at the First National Bank of Sullivan to accomplish the re-structuring of the corporate loans previously participated to Champaign National Bank. T-365. The meeting was conducted by Lee O'Neill, a senior loan officer with Champaign National, who initially outlined the position of the Bank with respect to eliminating the participation arrangement with the Sullivan Bank. T-365. Mr. O'Neill indicated that the credit was now being taken directly by Champaign National and would have to be both collateralized and personally guaranteed by the principals involved. T-365. The documents necessary to carry-out the re-structuring of the coproprate debt had been previously prepared by the Bank and brought to the meeting for review and execution by the parties involved. T-366.

9. Prior to the execution of any documents, various members of the Landers Family questioned Mr. O'Neill concerning the intentions of Champaign National Bank and its willingness to work with the Company after the loan documents were singed. T-71. Charles Landers testified that Mr. O'Neill agreed to "roll over" the debt due the Bank so long as the Company "made progress towards profitability or had a chance at profitability." T-72. Charles Landers further testified as to other requirements established by Mr. O'Neill concerning the payment of accrued interest and the periodic filing of projections and financial reports. T-73. Mr. O'Neill admits having told the Landers Family that the Bank was willing to "work with the corporation" under certain conditions, but denies having made any suggestion that the Bank would defer collection of the new Note or that the terms were anything other than as set forth on the Note which, on its face, was due in full in 120 days (December 21, 1982). T-369.

10. Jan Haegen of the Sullivan Bank also attended this meeting but did not hear Lee O'Neill tell Charles Landers or anyone else that Champaign National was agreeing to forbear payments on the new Notes. T-316. Robert E. Elder and his father, Vernon E. Elder, both Sullivan attorneys, attended the meeting at the specific request of Glen and Maxine Landers. T-472. Bob Elder was specifically aware that the proposed Note was for a term of 120 days and was further aware that Mr. O'Neill had only indicated a willingness to work with the Company and review its status at the time the Note came due. T-478. Arthur Mann, an attorney for Champaign National Bank, was also present and heard Mr. O'Neill say that it was not the Bank's intention to close down the Company at that time, but the Bank would simply have to review the situation when the Note came due. T-521. He heard no conversation indicating that the Note was due on any terms other than 120 days. T-521.

11. Prior to the conclusion of the meeting on August 23, 1982, Landers Seed Co., Inc. executed a Promissory Note to Champaign National Bank in the amount of $1,281,726.83 which was due, on its face, in 120 days (December 21, 1982). T-355. The Company and individual members of the Landers Family executed other legal documents at that time including a security agreement, a mortgage and personal guarantees. T-72, T-73. Following execution, Champaign National paid-off $1,200,000 of the Company's pre-existing indebtedness to the Sullivan Bank, as well as $81,726.83 of unpaid interest which had accrued to that date on the loans that had previously been participated to Champaign National. T-317. There was no new or additional monies loaned to the Company by this transaction. T-318.

12. On October 25, 1982, Lee O'Neill and Art Mann held a meeting at the Champaign National Bank with Ed Booth, a Decatur attorney, who was then representing Glen and Maxine Landers. T-373. Mr. Booth had requested the meeting to discuss the corporate loan from Champaign National Bank

which had been personally guaranteed by his clients. T-373. In the meeting, Mr. Booth asked the Bank for a delay in the payment that was coming due. T-376, T-377. The Bank agreed to the extension of the due date if it was able to obtain an additional real estate mortgage from the Landers Family. Plaintiff's Exhibit G. The Bank's agreement to renew was further conditioned on the payment of accrued interest and there being no change in the financial positions of either Glan and Maxine Landers or the Company. Plaintiff's Exhibit G. This commitment by the Bank was reflected in a letter from Lee O'Neill to Ed Booth dated November 1, 1982. T-501. Mr. Booth requested a clarification of the renewal period in a letter which he sent to Lee O'Neill dated November 3, 1982, with a carbon copy being sent to Glen and Maxine Landers. T-502, T-503. In a letter to Mr. Booth dated November 5, 1982, Mr. O'Neill amended the previous commitment by indicating that the Bank was willing to extend the term for an additional 120 days, assuming compliance with the other conditions of his earlier letter. T-503. A carbon copy of this letter from the Bank was also sent to Glen and Maxine Landers. T-503, T-504.

13. On or about December 21, 1982, Landers Seed Co., Inc. executed a renewal Promissory Note to Champaign National Bank in the amount of $1,281,726.83 which was due, on its face, in 120 days (April 20, 1983). T-9. The Company had paid accrued interest to the date of the renewal, but there had been no reduction in the principal balance. T-390, T-391. This Note was never renewed and became the subject matter of the litigation which was commenced by Champaign National Bank on January 16, 1984. T-8, T-9.

14. Between December 21, 1982 and March 29, 1983, Charles Landers provided Lee O'Neill with financial reports showing a significant reduction in both sales and profitability. T-391, T-392. These reports indicated that the inventory of the corporation was being liquidated to generate cash to continue the operation of the business. T-392.

15. On March 29, 1983, a meeting was held at the offices of Landers Seed Co., Inc. in Sullivan, which was attended by Lee O'Neill, Charles Landers and Jan Haegen, the latter being present because the Company still owed several hundred thousand dollars to the Sullivan Bank. T-397, T-398. The purpose of the meeting was to review the financial position of the Company and to review Charles Landers' efforts to find a buyer for the business. T-395. A discussion occurred concerning the reduction in inventory, operating costs and the sale of certain real estate by Glen and Maxine Landers that had been pledged to the Bank. T-398. Charles Landers indicated taht he was pursuing buyers for the business and also working to reduce expenses. T-399. At this time, the projections provided by Charles Landers were now indicating a loss for the fiscal year ending June 30, 1983. T-400. Lee O'Neill told Charles Landers that the business was going to have to be liquidated, unless additional capital could be injected or a buyer could be found. T-405.

16. On May 12, 1983, another meeting occurred between Lee O'Neill and Charles Landers at the offices of Landers Seed Co., Inc. in Sullivan. T-406. The purpose of this meeting was to respond to a request from the Company that it be loaned an additional $200,000 to $300,000. T-406. Lee O'Neill indicated that the Bank could not provide any additional funding without marketable collateral and no additional loan was made. T-407. There was discussion about payments that were past due from the Company to certain growers, the factor which had precipitated the Company's request for additional loans. T-407. The financial condition of the Company had deteriorated since the previous meeting on March 29, 1983 and the Company was in a cash flow crunch and out of money. T-407. The parties apparently agreed to review the situation following the close of the fiscal year on June 30, 1983. T-409.

17. On July 1, 1983, another meeting took place at the offices of Landers Seed Co., Inc. in Sullivan. T-410. It was attended by Lee O'Neill, Steve Vandenberg, Jan Haegen, Charles

Landers and Nick Piraino, a CPA from Decatur, who had done the Company's Accounting for many years. T-410. Charles Landers indicated that the loss of the fiscal year ending June 30, 1983 could be approximately $500,000. T-411. He also indicated that projected sales were down, that the inventory was down to a very low level and that cash was none existent. T-412. Lee O'Neill again indicated that the business would have to be liquidated unless there was an injection of capital or a buyer was immediately found. T-411. At that meeting, Charles Landers provided Lee O'Neill with projections for the coming fiscal year which would end on June 30, 1984. T-413. It provided two scenarios for the Company — the first showing a profit of $800 and the second a loss of $73,000. T-414. Mr. O'Neill was not significantly interested in these new projections because the Company could not continue in existence without a significant capital injection or a sale of the corporation. T-414. Before the meeting adjourned, a discussion took place concerning the preparation of a liquidation agreement and the items to be contained in it. T-416. Mr. O'Neill agreed to have such an agreement prepared and provided to the Company. T-416.

18. On July 5, 1983, Charles Landers executed a Liquidation Agreement on behalf of Landers Seed Co., Inc. whereby the Company agreed to an orderly liquidation of its assets under the direction of Champaign National. T-418. Charles Landers agreed to cooperate with the Bank in the liquidation process and continued to receive his salary through September of 1983. T-164.

19. In late August of 1983, Nick Piraino completed and issued his Compilation Report for Landers Seed Co., Inc. with respect to the fiscal year ending June 30, 1983. That Report showed that the Company had incurred a net loss of $854,492, and that the Company's current liabilities exceeded its current assets by $1,003,144 and that stockholder's equity was a negative $1,249,162. Defendant's Exhibit 14. The Report which is dated July 11, 1983 also indicates that the Company is

unable to continue in existence. Defendant's Exhibit 14. Mr. Piraino testified that no one from either the Bank or Landers Seed Co., Inc. ever told him that the Promissory Note dated December 21, 1982 was due on any date other than April 20, 1983. T-247.

20. On September 21, 1983, Steve Vandenberg and Art Mann held a meeting with Charles Landers at the office of Landers Seed Co., Inc. in Sullivan. T-526, T-527. The purpose of the meeting was to coordinate the wind-down of the business and the turn over of the remaining collateral to Champaign National. T-527. At that time, Charles Landers executed a document entitled "Agreement For Collection Of Accounts Receivable" which had been prepared by Art Mann and brought to the meeting. T-528. Charles Landers also executed several Assignments pertaining to various outstanding accounts due the Company. T-531. Charles Landers indicated that he was still pursuing the possible sale of the Company and Mr. Vandenberg indicated that the Bank did not object to continuing this until the next meeting which was being scheduled shortly. T-534. On that same date, Charles Landers entered into a Partnership Agreement with James W. Trisler for the purpose of the sale of agricultural seed under the name of "Land Seed Company." T-536. Charles Landers did not mention his new business venture to Mr. Vandenberg or Mr. Mann during the course of this meeting. T-536; T-537.

21. On October 6, 1983, another meeting was held at the offices of Landers Seed Co., Inc. in Sullivan. T-538. Present at that meeting were Steve Vandenberg, Art Mann, Charles Landers, Glen Landers, Maxine Landers, Nick Piraino, Jan Haegen, Jim Bennett, an attorney from Mattoon, Steve Wood, an attorney from Sullivan and John Sahn, an attorney from Peoria. T-539. Lorelyn Landers was also present and gave Steve Vandenberg some checks for the Bank which represented the collection of some accounts receivable, but the Bank was unsuccessful in getting a turnover of any remaining assets. T-541, T-542.

22. Between March 31, 1983 and September 15, 1983, Glen and Maxine Landers had sold several parcels of real estate which had previously been mortgaged to the Bank to secure the Company loan. T-403. The Bank had not requested the sale of this property and simply received the net proceeds from each sale in exchange for a mortgage release at the time of closing. T-403. A check in the amount of $260,300.97 was received on March 31, 1983. Defendant's Exhibit 6. A check for $98,767.50 was received on April 22, 1983. Defendant's Exhibit 7. A check for $16,000.00 was received on June 28, 1983, Defendant's Exhibit 8, and a final check for $144,777 was received on September 15, 1983. Defendant's Exhibit 9. All of these checks were drawn by Maxine Landers and delivered to the Bank for crediting to the balance due on the loan to Landers Seed Co., Inc. T-217.

23. On January 16, 1984, Champaign National Bank initiated legal action against Landers Seed Co., Inc. and the individual guarantors with respect to the Promissory Note dated December 21, 1982. T-8. As of that date, the unpaid principal balance due on the Note was $675,309.41, together with $49,327.96 of accrued interest for a total of $724,637.37. T-9.

ARGUMENT BY APPELLEE AND CROSS-APPELLANT

A. The Trial Court Erred By Permitting The Jury To Hear Certain Testimony In Violation Of The Rule Prohibiting Parol Evidence.

This entire case revolves around a very narrow set of facts relating to a meeting which took place at the First National Bank of Sullivan, Illinois on August 23, 1982. Immediately prior to that meeting, Landers Seed Co., Inc. had outstanding corporate loans with the Sullivan Bank in the approximate amount of 1.5 million dollars. All of these loans were short term (maturity of less than one year) and were unsecured by collateral, although they were personally guaranteed by Glen,

Maxine, Charles and Lorelyn Landers — all of whom were either stockholders, directors, officers or employees at the time.

For several years prior to August 23, 1982 the Sullivan Bank had participated most of the borrowing required by the Company to Champaign National Bank in order to avoid any lending limit problem. At that particular time, prior to the meeting, Champaign National held 1.2 million dollars of loan participations issued by the Sullivan Bank with respect to loans it had made to Landers Seed Co., Inc. Champaign National had just received a very negative financial report prepared by the Company's accounting firm and had made a management decision to terminate the participation arrangement with the Sullivan Bank and dealt directly with the Company for the purpose of better monitoring of the credit. Thus, the purpose of the meeting was for Champaign National to obtain the execution of various loan documents creating a direct lending relationship with the Company with respect to the 1.2 million dollar pre-existing debt which was already outstanding.

In preparation for the meeting, the Bank had prepared a Promissory Note to Champaign National Bank dated August 23, 1982 in the amount of $1,281,726.83 for execution by the corporation. The additional $81,726.83 contained in the Note represented accrued interest which the Company was unable to pay at that time and which the Bank capitalized into the new consolidated Note. The Bank had prepared other documents for execution by the corporation and the individual members of the Landers Family. These documents included a security agreement, a financing statement, a mortgage, new personal guarantees and even a so-called loan agreement between the various Banks involved.

In this context, all of the principal parties appeared for the meeting. Charles Landers was present as President of the Company, along with his wife, Lorelyn. Glen and Maxine Landers who still owned all of the stock of the Company were present and represented by two Sullivan attorneys, Robert and Vernon

Elder. Two officers were present on behalf of the Sullivan Bank and Champaign National was represented by its attorney, Art Mann, along with Lee O'Neill, a Senior Loan Officer.

Prior to the execution of any loan documents, various members of the Landers Family inquired of Lee O'Neill concerning the intentions of Champaign National with respect to its future relationship with the Company. Mr. O'Neill responded to their questions on behalf of Champaign National. More specifically, the dialogue concerned the willingness of Champaign National to work with the Company and the amount of time it might take for the Company to return to profitability. There is absolutely no dispute that a conversation involving those general concerns took place prior to any documents being executed, although the specific questions and answers are disputed.

Immediately following the aforementioned discussion, all of the loan documents prepared by Champaign National were executed by the Company and the other individuals involved. This included the Promissory Note dated August 23, 1982 which on its face and according to its terms was due in 120 days (December 21, 1982). This Note was subsequently renewed by the corporation's execution of a Promissory Note dated December 21, 1982 in the amount of $1,281,726.83, said Note bearing on its face and according to its terms a due date of April 20, 1983.

In defense of its liability on the Note dated December 21, 1982, Landers Seed Co., Inc. has plead the Affirmative Defense of Waiver alleging that the pre-execution conversation with the principals of the Company constituted a Waiver by the Bank of its rights to enforce the Promissory Note dated August 23, 1982, or any subsequent renewal thereof, according to its terms. Similarly, the Company by way of a Counterclaim for contract damages alleges that the pre-execution conversation constituted an oral agreement or contract to defer collection which the Bank subsequently breached by commencing the liquidation of the Company on July 1, 1983.

The narrow legal question presented by all of the foregoing is whether evidence pertaining to the pre-execution conversation in support of the Company's theory of waiver and oral contract should have been barred from admission as being parol evidence. The Trial Judge admitted evidence of this pre-execution conversation over the repeated objections of the Bank.

In general, parol or extrisic evidence is not admissible to vary or otherwise alter the terms of a written instrument which is complete on its face. This rule would apply to a Promissory Note, as is the case here, and would bar evidence of any prior conversation between the parties which was being asserted to establish terms at variance with those specifically set forth on the written instrument, to-wit: the Promissory Note dated August 23, 1982 which was due in full on December 21, 1982. Recently, the Illinois Supreme Court dealt with a similar case involving a Promissory Note and held that ' . . . parol evidence is inadmissible to show that an obligation under a Note, absolute on its face, is conditional." *Main Bank of Chicago v. Baker,* 86 Ill.2d 188 427 NE 2d 94 at 99 (1981). The Court further noted that parol evidence was inadmissible to vary or contradict the clear written provisions of an integrated contract.

In this case, Landers Seed Co., Inc. offered the testimony concerning the pre-execution conversation solely for the purpose of establishing a "waiver" of the Banks right to collect the Note according to its terms or for the purpose of establishing an "oral contract" by the Bank to defer collection in a manner inconsistent with the terms set forth on the face of the Note. In either event, such testimony is inadmissible as parol evidence and should have been excluded from consideration by the Jury.

In connnection with the issue of "waiver," it should be noted that it usually involves the intentional relinquishment of a known right. Obviously, a contracting party such as a bank is free to waive or relinquish rights placed in a Note or contract for its benefit. In this case, when the "conversation" took place, it

was prior to the execution of any loan documents with Champaign National Bank. Therefore, it was not possible for Champaign National to have waived or relinquished any rights because it had none with respect to Landers Seed Co., Inc. at that particular time. Those rights were created and came into existence only upon the subesequent execution of the loan documents by Landers Seed Co., Inc. and the Bank never did anything to indicate or otherwise imply that it was not going to enforce the Promissory Note according to its terms.

Similarly, following execution of the Promissory Note and other loan documents on August 23, 1982, there is absolutely no evidence that Champaign National acted in a manner from which anyone could imply or infer that the Promissory Note was not going to be enforced according to its tersm, i.e. the Note was due in full on December 21, 1982. It is obvious that Glen and Maxine Landers had not been lulled into any false belief concerning "waiver" as they hired Ed Booth, a Decatur attorney to meet with Champaign National and negotiate a renewal of the original Note. Mr. Booth accomplished this undertaking on behalf of his clients. As is clearly reflected in Mr. Booth's testimony and his exchange of correspondence with Lee O'Neill during November of 1982.

B. The Trial Court Erred In Not Vacating The Verdict Of The Jury As To Count I Of The Counterclaim Due To The Insufficiency Of The Evidence In Establishing That The Bank's Breach Of Contract Caused The Failure Of Landers Seed Co., Inc.

According to the evidence offered by Landers Seed Co., Inc., the breach of contract committed by the Bank occurred on July 1, 1983 when Lee O'Neill met with Charles Landers and indicated that the Company would have to be liquidated. Therefore, the Compilation Report prepared by Nick Piraino for the fiscal year ending June 30, 1983 (Defendant's Exhibit No. 14), is extremely helpful as it reflects the precise financial status of the Company as of June 30, 1983 — exactly one day before the

Bank allegedly breached its contract. In that respect, Mr. Piraino indicates that the Company's current liabilities exceeded it current assets by $1,003,144 and that the stockholders equity was a negative $1,249,162. Therefore, the Company had no monetary value as of June 30, 1983 and no fiscal damages could be caused by the alleged breach of contract by the Bank on the following day, July 1, 1983.

C. The Trial Court Erred By Giving Defendant's Instruction No. 23 Which Allowed The Jury To Consider Inappropriate Items Of Contract Damages.

In this regard, Defendant's Instruction No. 23 improperly indicated that the Jury could calculate damages based on "an award of both the losses caused and the gains prevented by the Bank's breach" which could include "(a) amount sufficient to restore its customer base, (b) an amount sufficient to satisfy the on-going expenses of Landers Seed Co., Inc. from July 1, 1983 including interest owed to banks and lease payments." It is well established that the loss incurred by a business which fails due to another's breach of contract is the value of the business. As stated in *Central Information Financial Services, Ltd. v. 1st National Bank of Decatur,* 121 Ill.App.3d 1052, 471 NE 2d 992 at 999 (4th Dist. 1984). "As nearly as possible, damages for breach of contract should place the party injured in the position it would have been if no breach had occurred." This Instruction did not comport with the mandate of the foregoing decision and allowed the Jury to consider inappropriate items in assessing damages as to Count I of the Counterclaim.

D. The Trial Court Did Not Err In Denying The Post Trial Motions Of Landers Seed Co., Inc.

In this regard, Landers Seed Co., Inc. argues that the Jury Verdicts in favor of the Bank as to the Promissory Note, on the one hand, is inconsistent with the Jury Verdict in favor of the Company on its Counterclaim against the Bank for breach of contract. It is the position of Landers that only the Verdict on

the Counterclaim reflects the true intentions of the Jury, citing voluminous authority in support of its position. However, an equally cogent argument can be made that the verdict in favor of the Bank is the "true" verdict with the result of setting aside the verdict in favor of Landers as to Count I of the Counterclaim. Interestingly, a cursory review of the Jury Instructions pertaining to both the elements of Waiver and the elements of Breach of Contract indicate that those formats were not consistent with each other and, therefore, there is not necessarily a legal inconsistency with the Jury having returned the Verdicts as it did. Consequently, the Trial Court properly exercised its discretion in denying all of Landers Post-Trial Motions premised on inconsistent Verdicts.

CONCLUSION

For the reasons hereinabove set forth, Champaign National Bank prays this Court to vacate and set aside the Judgment previously entered against it with respect to Count I of the Counterclaim and to affirm the decision of the Trial Court in denying the Post-Trial Motions of Landers Seed Co., Inc.

Respectfully submitted:

JAMES W. EVANS, LTD.
EVANS & FROEHLICH
Attorneys at Law
44 Main St., P.O. Box 737
Champaign, IL 61820

BY: /s/ James W. Evans
JAMES W. EVANS, LTD.
Attorney for
Champaign National Bank

DATED: November 13, 1987

APPENDIX S

No. 4-87-0460

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

THE CHAMPAIGN NATIONAL BANK,
a National Banking Association,
Plaintiff-Appellee-Cross-Appellant,

vs.

LANDERS SEED CO., INC.,
Defendant-Appellant-Cross-Appellee.

Appeal from the Circuit Court of the
Sixth Judicial Circuit, Moultrie County
Case No. 84-L-4

Honorable W. B. Kranz
Judge Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT-CROSS-APPELLEE

By: LAW OFFICES OF
JOHN H. BISBEE
Attorneys for Defendant-
AppellantCross-Appellee
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

Of Counsel: John H. Bisbee

ORAL ARGUMENT REQUESTED

No. 4-87-0460

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

THE CHAMPAIGN NATIONAL BANK,
a National Banking Association,
Plaintiff-Appellee,

vs.

LANDERS SEED CO., INC.,
Defendant-Appellant.

Appeal from the Circuit Court of the
Sixth Judicial Circuit, Moultrie County
Case No. 84-L-4

Honorable W. B. Kranz
Judge Presiding

POINTS AND AUTHORITIES

A. The Promissory Note Dated December 21, 1982 Pursuant to Which The Champaign National Bank Brought Suit Was Not a Fully Integrated Agreement; Parol and Other Extrinsic Evidence Was Therefore Admissible to Prove The Intent of the Parties Respecting the Execution of Said Promissory Note 3

Main Bank of Chicago v. Baker, 86 Ill. 2d 188, 427 N.E. 2d 94 (1981) 3,5

Restatement 2d of Contracts §209 (1981) 3,4,7

Restatement 2d of Contract §210 (1981) 4,6,7

Exchange National Bank of Chicago v. DeGraff, 110 Ill.App. 3d 145, 441 N.E.2d 1197 (1st Dist. 1982) .. 4,5

State Bank v. Cirivello, 74 Ill.2d 426 (1978) 5,6,7

Schultz v. Delta Rail Corp., 156 Ill.App.3d 1 (2d Dist. 1987) 5,6,7

Restatement 2d of Contracts §214 (1981) 6,7

3 Corbin §§562 through 590 (1960 ed.) 7,8

B. The Evidence Sufficiently Established That The Bank's Breach of Contract Caused the Failure of Landers Seed Company 8

Central Information Financial Services Limited v. First National Bank of Decatur, 128 Ill.App.3d 1052 (4th Dist. 1984) 8,9,10

Restatement 2d of Contracts §344 (1979) 8

1 Knapp, Commercial Damages, Paragraph 1.03 8

Vitex Manufacturing Corp. v. Caribtex Corp., 377 F.2d 795 (3d Cir. 1967) 9

Western Union Telegraph Co. v. Hall, 124 U.S. 444 (1888) 9

Gurney Indis Inc. v. St. Paul Fire and Marine Insurance Co., 467 F.2d 588 (4th Cir. 1972) 9

C. Defendant's Instruction No. 23 Allowed the Jury to Consider Proper Elements of Contract Damages 10

Central Information Financial Services, Ltd. v. First National Bank of Decatur, 128 Ill.App 3d 1052 (4th Dist. 1984) 10

D. The Trial Court Erred In Refusing to Grant Landers' Post-Trial Motion 10

Conclusion 11

SUPPLEMENTAL STATEMENT OF THE ISSUES

1. Was parol and other extrinsic evidence admissible to prove the intent of the parties respecting the execution of the promissory note dated December 21, 1982?

2. Was the evidence offered by Landers Seed Company in support of its counterclaim legally sufficient to establish that Landers suffered damages as a result of the bank's breach of the oral contract?

3. Did Landers Instruction No. 23 properly instruct the jury respecting the elements of contract damages in the context of the instant case?

SUPPLEMENTAL STATEMENT OF RELEVANT FACTS

Sometime in October 1982 Maxine and Glen Landers individually engaged the services of a lawyer by the name of Ed Booth. T-497, 504, 555. They authorized him to assist in securing for the benefit of the bank signatures of the Landers children to the mortgage of farm land in which Glen and Maxine Landers owned a life estate and the children held remainder interests. T-555-556, Plaintiff's Exhibit G, Defendant's Exhibit 3. The Champaign Bank had required on August 23, 1982 that the land be conveyed to it as security. T-556. Glen and Maxine Landers never authorized Booth to renegotiate any promissory notes. T-556. To the extent Booth did anything beyond what was necessary respecting giving the bank a security interest in the farm land, he would have been acting outside his authority. T-557. Booth never purported to act on behalf of Landers Seed Company. T-497, 504.

ARGUMENT

A. The Promissory Note Dated December 21, 1982 Pursuant To Which The Champaign National Bank Brought Suit Was Not a Fully Integrated Agreement; Parol and Other Extrinsic Evidence Was Therefore Admissible to Prove the Intent of the Parties Respecting The Execution of Said Promissory Note.

The Plaintiff Bank argues at Pages 13 through 18 of its Brief that it was error for the circuit court to have considered parol and other extrinsic evidence as to events, conversations, and documents occurring prior to the execution by the corporation on December 21, 1982 of the promissory note pursuant to which the bank has brought the instant lawsuit. The bank's argument is predicated on the Illinois Supreme Court's 1981 decision in *Main Bank of Chicago v. Baker,* 86 Ill.2d at 188, 427 N.E.2d 94 (1981). However, the bank's argument is misplaced because it assumes that the promissory note of December 21, 1982 was a fully integrated agreement between the parties, an assumption which is belied by the record in this case and by the applicable principles of contract construction.

Restatement 2d of Contract (1981) §209 provides in relevant part that

> "(1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
>
> (2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
>
> (3) Where the parties reduce an agreement to a writing which in view of its completeness and specificty reasonably appears to be a complete agreement, it is to be taken to be an integrated agreement unless it is established by other

> evidence that the writing did not constitute a final expression."

Restatement 2d of Contracts (1981) §209 at 115. Comment c to §209 of the Restatement 2d states that

> "Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence. The issue is distinct from the issue whether an agrement was made and whether the document is genuine, and also from the issue whether it was intended as a complete and exclusive statement of the agreement."

In addition, Restatement 2d (1981 §210 provides in relevant part that

> "(1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.
>
> (2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.
>
> (3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to the determination of a question of interpretation or to application of the parol evidence rule."

Restatement 2d of Contracts (1981 §210 at 117-18. Comment b to §210 of the Restatement provides

> "that a writing was or was not adopted as a completely integrated agreement may be proved by any relevant evidence. A document in the form of a written contract, signed by both parties and apparently complete on its face, may be decisive on the issue in the absence of credible contrary evidence. But, a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties"

Restatement 2d of Contracts §210, Comment b at 118.

In *Exchange National Bank of Chicago v. DeGraff,* 110 Ill.App.3d 145, 441 N.E.2d 1197 (1st Dist. 1982), the court held on the strength of Restatement 2d §209, *supra,* that the trial court had properly admitted extrinsic and parol evidence to allow the jury to determine whether the bank had agreed to limit to $60,000 the amount of individual guarantees respecting a corporate indebtedness. In so doing the court concluded that "a written document is not self proving," 110 Ill.App.3d 145, 153, and it was therefore necessary to consider any relevant evidence surrounding the creation of the document to determine whether the parties intended the writing to be the final or integrated expression of their agreement. *Id.*

Moreover, the *Exchange v. DeGraff* court in holding as it did relied in part on the Illiois Supreme Court's decision in *State Bank v. Cirivello,* (1978), 74 Ill.2d 426, as implicitly rejecting the "face of the instrument" test in favor of allowing testimony that a guaranty, seemingly complete and unconditional on its face, was not to take effect unless and until all thirteen limited partners in a partnership agreed to be guarantors for a bank loan. The *Exchange National Bank v. DeGraff* court observed that in *Cirivello* the "guaranty" forms did not contain any limitation or condition respecting the requirement that all limited partners were to sign the guaranties. Nonetheless the Supreme Court in *Cirivello* had held that the condition became a part of the guaranty if it were known and agreed upon by all the parties. *Cirivello, supra,* 74 Ill.2d 426, 431, 386 N.E.2d 43, 45. That fact could only be revealed by resort to parol and other extrinsic evidence. Additionally, the *Exchange Bank v. DeGraff* court observed that the Illinois Supreme Court in *Main Bank v. Baker* had specifically set forth various areas where the parol evidence exclusionary rule did not apply including the "incomplete instrument circumstance" that the *Main Bank* court held obtained in *Cirivello, supra.*

Subsequent to *Exchange National Bank v. DeGraff, supra,* the Second District decided *Shultz v. Delta Rail Corp.,* 156 Ill.App.3d 1 (2d Dist. 1987). Therein, the court refused to accept a defendant's argument that circumstances which occurred in 1981 should be permitted under either Restatement 2d §209 or §210 to bear upon whether a written agreement executed in 1979 was an integrated agreement. In so holding, the *Shultz* court relied upon the illustration accompanying Comment b to §210 indicating that inquiry as to whether a contract is integrated should focus on evidence "of the prior and contemporaneous conduct and language of the parties," citing Restatement 2d of Contracts §210, Comment b Illustration 1 at 118. In this respect, the *Shultz* court is in accord with Restatement 2d §214 (1981) specifying that "agreements and negotiations *prior to or contemporaneous with* the adoption of a writing are admissible in evidence to establish (a) that the writing is or is not an integrated agreement." [Emphasis supplied].

Applying the foregoing principles to the case before this court, Landers respectfully submits that it becomes clear that the promissory note executed by Landers on December 21, 1982 was nothing more than a part of an overall loan agreement into which the parties had previously entered on August 23, 1982. That loan agreement consisted in part of five separate documents, the primary among them was the document entitled "Loan Agreement," C-139 and Landers Exhibit No. 1 which described the relationship struck that day among Champaign National Bank, Landers Seed Company and the First National Bank of Sullivan. It was pursuant to that document that the promissory note dated August 23, 1982 (Landers Exhibit 2) was executed and pursuant to that document that the mortgage, security agreement, and guaranty were executed. It was also pursuant to the "Loan Agreement" document, which is incontrovertibly vague and incomplete (*Cirivello, supra*) in its terms, that the verbal agreement between Landers and the bank was struck whereby the bank agreed to work with Landers Seed Company for a period up to three years so long as Landers Seed

Company made progress toward profitability, paid interest on the August 23, 1982 note and the ensuing notes thereafter, reduced the principal on said notes, and made monthly reports. Thereafter, between August 23, 1982 and December 21, 1982, the interest on the August 23 note was paid. Pursuant to explicit testimony of the bank's primary witness, Lee O'Neill, that note was then renewed pursuant to the August 23, 1982 verbal understanding between the bank and Landers and became the December 21, 1982 note. Transcript Page 443.

In denying the Plaintiff bank's post-trial motion predicated on the parol evidence rule the court said that

> "the December 21, 1982 note was a renewal of the August 23, 1982 note and was identical to the latter except for the date, maturity date, and rate of interest. It was a contract and one of 'the documents' referred to — hence, oral statements or agreements, after August 23, 1982 were not barred by the parol evidence rule, which in any way modified the parties respective positions, obligations, or rights with respect thereto."

C-710. That ruling was consistent with the circuit court's denial of the bank's motion *in limine* prior to the beginning of trial directed to the same issue. C-531.

The circuit court's position was altogether in accord with the Restatement §§209 and 210 and in particular Comment c to §209 and Comment b to §210. The court in essence made a finding pursuant to the requirements of Restatement with §209(2) that the December 21, 1982 note was not an integrated agreement. It therefore held that the parol evidence rule was not applicable. This was a determination of fact made by the circuit court. The evidence overwhelmingly supported that finding. The bank did not in its evidence suggest otherwise. The parol evidence rule was, therefore, not applicalbe to bar evidence of negotiations and agreements prior to the execution of the December 21 note, namely the events of August 23.

Restatement 2d of Contracts §214 (1981); *State Bank v. Cirivello, supra* 74 Ill.2d 426 (1978) and *Shultz v. Delta Rail Corp., supra,* 156 Ill.App.3d 1, 12-13. See also 3 Corbin §§562 through 590 (1960 ed.).

The author of the Corbin treatise, *supra* at §587, states that "promissory notes and bills of exchange are seldom intended by the parties to be complete integrations of the agreement in pursuance of which they are given." 3 Corbin §587 at Page 510 (1960 ed.) The reason for this the author observes is that

> "(i)t should always be remembered, however, that the form of the note is usually drawn for the purpose of making the note negotiable not for the purpose of integrating the terms of the agreement. The execution and delivery of the note may be nothing more than a part performance by one of the parties of his agreement with the other and not an attempt at integration in writing of the terms of that agreement."

Id. at Page 515. The immediately foregoing, is of course, precisely what Landers respectfully submits that the evidence showed to have been and the jury accepted was the situation in the case at bar. As a matter of law, that situation constituted waiver by the bank of any right it had to repayment within 120 days of December 21, 1982 set forth on the face of the note.

B. The Evidence Sufficiently Established That the Bank's Breach of Contract Caused the Failure of Landers Seed Company

This court observed in *Central Information Financial Services Limited v. First National Bank of Decatur,* 128 Ill.App.3d 1052, 1060 (4th Dist. 1984), that "as nearly as possible, damages for breach of contract should place the injured party in the position it would have been if not breach had occurred." The primary theory of damages is to protect the expectation interest of the parties and give an aggrieved party the benefit of the bargain. See Restatement 2d of Contracts §344 (1979). See also 1 Knapp, Commercial Damages, Paragraph 1.03.

The evidence established that for fiscal year 1983 or the year beginning July 1, 1982, Landers Seed Company had sales of $800,000. The evidence also established that those sales depended upon the company's customer base. The cost of maintaining that customer base in fiscal year 1983 was between $50,000 and $60,000, said figures consisting of advertising costs, travel expenses, test plots, research and related administrative expenses. As revealed by the evidence, the customer base was extinguished after the company was liquidated on and after July 1, 1983. The evidence further established that five years would reasonably have been required to rebuild that customer base. T-228.

This court in *Central Information Services, supra,* concluded on the basis of *Vitex Manufacturing Corp. v. Caribtex Corp.,* 377 F.2d 795 (3d Cir. 1967), that two methods exist to make whole an injured party in light of overhead expenses. *Central Information Financial Services, supra* at 1063. One method is "to award damages for the contract price less the award of expenses saved because the injured party is not required to perform." *Id.* The other method this court said was "to determine the amount of overhead applicable to the contract . . ." *Id.* and deduct that amount from the contract price and thereafter award additional damages for overhead expense applicable to the breached contract for which there had been no reimbursement. *Id.* However, neither of those methods appears applicable in the present factual context.

Rather, viewing the instant matter from the vantage point of what Landers lost as a result of the bank's liquidation of the company, namely its customer base which had cost $60,000 to maintain for the year ending June 30, 1983 in addition to the five years estimated needed to rebuild that customer base, the jury would have been entitled to award Landers $300,000 to make it whole. The jury awarded Landers only $60,833.31. That was an obviously inadequate award in light of this court's decision in *Central Information Financial Services, supra.*

There is no doubt that damages are recoverable only if the breach of contract was the cause of the damages. See for e.g. *Western Union Telegraph Co. v. Hall,* 124 U.S. 444 (1888); *Gurney Indis Inc. v. St. Paul Fire and Marine Insurance Co.,* 467 F.2d 588 (4th Cir. 1972). As applied to the facts established in the instant case, the bank simply does not contest that Landers lost its customer base as the direct result of the liquidation of the company. Therefore, the evidence brought forth, consistently with this court's opinion in *Central Financial Information Services, supra,* established that the bank directly caused Landers Seed Company damages far in excess of what the jury awarded under the method of damage calculations applicable to the instant case.

C. Defendant's Instruction No. 23 Allowed the Jury To Consider Proper Elements of Contract Damages.

Landers incorporates by reference the arguments set forth under heading B, *supra.* In addition, under this court's decision in *Central Financial Information Services v. First National Bank, supra,* requiring that an injured party be made whole, there can be no doubt that a customer base is the sine qua non to the existence of a seed company such as Landers. The customer base was what was extinguished when the bank, contrary to its contractual obligations, liquidated the company on and after July 1, 1983. To reestablish that customer base on the basis of the cost of maintaining it is the appropriate measure of damages to make Landers whole. The jury was, therefore, properly instructed, but did not, as hereinabove set forth, return an adequate award.

D. The Trial Court Erred in Refusing To Grant Landers' Post-Trial Motion.

Landers perceives that the bank does not make an argument truly responsive to Landers' Opening Brief respecting the issues of whether or not the jury intended to find a waiver or whether the verdict as returned was inherently inconsistent. For this

reason, Landers relies upon what was set forth in its Opening Brief as reasons for reversing the judgment of the circuit court in favor of the bank on the promissory note in the amount of $724,637.37.

CONCLUSION

For the reasons hereinabove stated, Landers respectfully submits that the trial court properly admitted parol and other extrinsic evidence to show that the note of December 21, 1982 was not the integrated agreement between the parties. Additionally, the court properly refused to vacate the jury verdict in favor of Landers respecting Count I of its Counterclaim and properly instructed the jury respecting the elements of damage. Last, for the reasons stated in Landers' Opening Brief, the trial court erred in refusing to grant the post-trial motion of Landers Seed Company by reason of which this Court should (1) enter judgment for Landers in the amount of $60,833.31 or (2) enter an order granting Landers a new trial for the reasons stated in Landers' Opening Brief.

Respectfully Submitted:

LAW OFFICES OF
JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

BY: /s/ JOHN H. BISBEE

DATED: November 30, 1987

CERTIFICATE OF MAILING

I hereby certify that I have on this 30th day of November, 1987, deposited three true and correct copies of the foregoing REPLY BRIEF OF DEFENDANT-APPELLANT-CROSS-APPELLEE in the United States mails, postage prepaid to Mr. James Evans, Evans & Froehlich, 44 Main Street, P.O. Box 737, Champaign, IL 61820.

/s/ JOHN S. BISBEE

APPENDIX T

No. 4-87-0460

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

THE CHAMPAIGN NATIONAL BANK,
a National Banking Association,
Plaintiff-Appellee-Cross-Appellant,

vs.

LANDERS SEED CO., INC.,
Defendant-Appellant-Cross-Appellee.

Appeal from the Circuit Court of the
Sixth Judicial Circuit, Moultrie County
Case No. 84-L-4

Honorable W. B. Kranz
Judge Presiding

PETITION FOR REHEARING

By: LAW OFFICES OF
JOHN H. BISBEE
Attorneys for Defendant-
AppellantCross-Appellee
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

No. 4-87-0460

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

THE CHAMPAIGN NATIONAL BANK,
a National Banking Association,
Plaintiff-Appellee-Cross-Appellant,

vs.

LANDERS SEED CO., INC.,
Defendant-Appellant-Cross-Appellee.

Appeal from the Circuit Court of the
Sixth Judicial Circuit, Moultrie County
Case No. 84-L-4

Honorable W. B. Kranz
Judge Presiding

The Defendant-Appellant-Cross-Appellee Landers Seed Company, hereafter Landers hereby petitions this Court for rehearing as follows:

POINTS AND AUTHORITIES

I.

This Court Misapprehended Its Authority In Concluding That There Was "Insufficient Evidence Of A Contract" As That Issue Was Not Raised In The Bank's Post-Trial Motion, Was Not Ruled Upon By The Circuit Court, Was Not Briefed Or Argued On Appeal By The Bank And, In Fact, The Contrary Was Admitted By The Bank In Argument, By Reason Of All Of Which, This Court Had No Power Under The Ill. Constitution (1970), Article VI §6 And *Ill. Rev. Stat.* Chapter 110A §366(b)(2)(iii) To Decide The Sufficiency Of Evidence of Contract 1

Illinois Constitution (1970, Article VI §6 1,2,7

Sprague v. Goodrich, 376 Ill. 80, 32 N.E. 2d 897 (1941) 1,2,3,7

Board of Education of Chicago v. Chicago Teachers Union, 26 Ill.App.3d 216 (1st Dist. 1974) 2,3,7

Edelman v. Lee Optical Co., 24 Ill.App.3d 216 (1st Dist. 1974 2,3,7

In Reorganization of the Fox Valley Community Airport Authority, 23 Ill.App.3d 168, 318 N.E.2d 496 2

SHA Constitution (1870) Article VI, §7 3

Franks v. North Shore Farms Inc., 115 Ill.App.2d 57 (1st Dist. 1969) 3

People v. Love, 6 Ill.App.3d 572 (1972) 3

Ill. Rev. Stat. Chapter 110A §366(b)(2)(iii) 3,8

Ill. Rev. Stat. Chapter 110 §2-1202(a) 3,5,8

Ill. Rev. Stat. Chapter 110 §2-1202(b) 3,5,8

Brown v. Decatur Memorial Hospital, 83 Ill.2d 344 (1980) 4,8

Pedrick v. Peoria and Eastern RR Co., 37 Ill.2d 494 (1967) 5

II.

This Court Misapprehended Its Authority In Concluding That "The Jury Verdict In Favor Of Landers And Against The Bank Was Against The Manifest Weight Of The Evidence" In That That Issue Was Not Preserved In A Post-Trial Motion, Was Not Ruled Upon By The Circuit Court, And Was Not Argued On Appeal And, Therefore, This Court Had No Power Under Ill. Constitution (1970), Article VI §6 And *Ill. Rev. Stat.* Chapter 110A §366(b)(2)(iii) To Decide The Issue 8

Illinois Constitution (1970), Article VI §6 8

Ill. Rev. Stat. Chapter 110A §366(b)(2)(iii) 8

Pedrick v. Peoria and Eastern RR Co., 37 Ill.2d 494 (1967) 8

5A Corbin on Contracts (1964) §§1228-1229, Pages 506-510 10

6 Corbin on Contracts §1261 (1964) 10

Restatement 2d of Contracts, §261-272 (1981) 10

III.

Even If The Appellate Court Had The Authority To Conclude The Verdict In Favor Of Landers Was "Against The Manifest Weight Of The Evidence," Which It Did Not, The Remedy Was To Order A New Trial, Not To Enter Judgment N.O.V. 10

Ill. Rev. Stat. Chapter 110 §2-1202(b) 10,11

Pedrick v. Peoria and Eastern RR Co., 37 Ill.2d 494 (1967) 10,11

Corcoran v. City of Chicago, 373 Ill. 567, 27 N.E.2d 451 (1940) 10

Mizowek v. DeFranco, 64 Ill.2d 303 (1976) 10

Heuer v. Goldberg, 106 Ill.App.2d 555 (1st Dist. 1969) 10

Spankroy v. Alesky, 45 Ill.App.3d 432 (1st Dist. 1977) 10

Snedden v. Levenka, 92 Ill.App.3d 979, 460 N.E.2d 1097 10

Brown v. Decatur Memorial Hospital, 83 Ill.2d 344 (1980) 11

Gallick v. Novotney, 124 Ill.App.3d 756 (3d Dist. 1984) 11

IV.

Even If The Appellate Court Had The Authority To Decide (i) The Sufficiency Of The Evidence Of Contract and (ii) The Sufficiency Of The Weight Of The Evidence In Support Of The Jury Verdict That The Bank Had Breached The Contract, Which It Did Not, The Appellate Court's Opinion Misapprehended The Nature Of The Contract Pleaded And Proved By Landers; It Misapprehended The Nature And Effect Of The Participation Agreement Between The Champaign And Sullivan Banks; And It Misapprehended The Law Of Waiver And Its Applicability To The Instant Case 11

A. Nature of the Contract Pleaded and Proved 11

McErlean v. Union National Bank, 90 Ill.App.3d 1141 (1980) 12

McClellan v. Banc Midwest (December 31, 1987, 4th Dist. Gen. No. 4-87-0305) 12

Martindale v. Lake Shore National Bank, 15 Ill.2d 272 (1958) 13

Foster Enterprises v. Germania Federal Savings & Loan Assoc., 97 Ill.App.3d 22 (3d Dist. 1981)..... 13

Carrioco v. Delp, 141 Ill.App.3d 684 (4th Dist. 1986)... 13

Restatement 2d of Contracts §205 (1981) 13

B. The Participation Agreement 15

3A Corbin Contracts §752 Pages 480-81 15

Illinois Constitution (1970) Article VI, §6..... 19

Sprague v. Goodrich, 376 Ill. 80, 32 N.E. 2d 897 (1941) 19

Board of Education of Chicago v. Chicago Teachers Union, 26 Ill.App.3d 216 (1st Dist. 1974)..... 19

Edelman v. Lee Optical Co., 24 Ill.App.3d 216 (1st Dist. 1974) 19

Ill. Rev. Stat. Chapter 110A §366(b)(2)(iii)..... 19

C. This Court Has Misapprehended The Law of Waiver 20

Restatement 2d of Contracts, §84 21,22,23

Restatement 2d of Contracts, §89 22,23

3A Corbin §752 (1960)..... 22

Restatement 2d of Contracts, §90 23

V.

This Court's Opinion In Concluding (i) "Insufficient Evidence Of Contract" And Entering Judgment NOV On That Basis And (ii) That The Jury's Verdict In Favor Of Landers "Was Against The Manifest Weight Of The Evidence," Deprived Landers Of Its Right To Jury Trial Guaranteed Inviolate By The Ill. Constitution (1970) Article I §13 And Thereby Deprived Landers Of The Necessarily Inconsistent Verdict Relative To The Verdict In Favor Of The Bank On The Promissory Note, Which Inconsistency Requires A New Trial 24

Illinois Constitution (1970) Article I, §13 24

Zurich Insurance v. Raymark Industries, 118 Ill.2d 23 .. 24

Stevens v. Kasten, 383 Ill. 127, 48 N.E.2d 508 (1943) ... 24

Cobin v. Illinois Pollution Control Board, 56 Ill.2d 582, 401 N.E.2d 1390 (1974) 24

Baber v. Rardin Grain Co., 6 Ill.App. 63, 126 N.E.2d 529 (1955) 24

Construction Aggregates Corp. v. Hewitt Robins, Inc., 404 F.2d 505 (7th Cir. 1968) 24

Rankin v. Fidelity Ins., 189 U.S. 242 24

3 Corbin on Contracts (1964) §554 at Pages 227-227 24

Meyers v. Selznick Co., 373 F.2d 218 (2d Cir. 1966) 24

Sprague v. Goodrich, 376 Ill. 80, 32 N.E.2d 897 (1941) . 25

Ill. Rev. Stat. Chapter 110A §366(b)(2)(iii) 29

Brown v. Decatur Memorial Hospital, 83 Ill.2d 344 (1980) 25

Gallick v. Novotney, 124 Ill.App.3d 756 (3d Dist. 1984) 25

Illinois Constitution (1970) Article I §13 25

Moore v. Jewel Tea Co., 46 Ill.2d 288, 263 N.E.2d 103 (1970) 26

Martin v. McCarry, 2 Ill.App.3d 650, 275 N.E.2d 97 (4th Dist. 1971) 26

Manders v. Pulice, 44 Ill.2d 511, 256 N.E.2d 330 (1970) 26

Western Springs Park District v. Lawrence, 343 Ill. 302, 175 N.E. 579 (1931) 26

Pease v. Ace Hardware Home Center, 147 Ill.App.3d 546 (2d Dist. 1980) 26

Stewart v. Huff, 14 Ill.App.3d 782, 303 N.E.2d 641 (1st Dist. 1973) 26

VI.

This Court's Decision Reversing The Judgment In Favor Of Landers And Affirming The Judgment In Favor Of The Bank Under Circumstances Where This Court Had No Constitutional Or Statutory Authority To Reverse The Judgment In Landers' Favor On The Bases That It Did, Deprived Landers Of Its Right To Trial By Jury Guaranteed By the Ill. Constitution (1970) Article I §13 And Thereby Denied Landers Its Property Right Created By Illinois Law Not To Be Deprived Of A Jury Trial Without Due Process Of Law, Guaranteed By The Fourteenth Amendment To The United States Constitution 27

Illinois Constitution (1970) Article I §13 27,28,30

Board of Regents v. Roth, 408 U.S. 564 (1972) 27,28

Cleveland Board of Education v. Loudermill et al., 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) .. 28

Morrisey v. Brewer, 408 U.S. 471 (1972)..... 28

Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982) 28

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950)..... 28

Ill. Rev. Stat. Chapter 110A §366(b)(2)(iii)..... 29

Ill. Rev. Stat. Chapter 110A §1202(b) 29

Stewart v. Huff, 14 Ill.App.3d 782, 303 N.E.2d 641 (1st Dist. 1973) 30

ARGUMENT

I.

This Court Misapprehended Its Authority In Concluding That There Was "Insufficient Evidence Of A Contract" As That Issue Was Not Raised In The Bank's Post-Trial Motion, Was Not Ruled Upon By The Circuit Court, Was Not Briefed Or Argued On Appeal By The Bank And, In Fact, The Contrary Was Admitted By The Bank In Argument, By Reason Of All Of Which, This Court Had No Power Under The Ill. Constitution (1970), Article VI §6 And *Ill. Rev. Stat.* Chapter 110A §366(b)(2)(iii) To Decide The Sufficiency Of Evidence Of Contract,

This Court had no constitutional or statutory authority to consider whether there was or was not sufficient evidence to show the existence of a contract between Landers and the Champaign National Bank. Two lines of argument, first under the Illinois Constitution and second under the relevant statutes demonstrate the truth of this proposition.

Under the Illinois Constitution (1970), Article VI §6,[1] the jurisdiction of the Appellate Court is essentially appellate jurisdiction. That means, according to the Court in *Sprague v. Goodrich,* 376 Ill. 80, 32 N.E.2d 897 (1941), construing the predecessor of Article VI, §6 of the 1970 Illinois Constitution, that the jurisdiction of the appellate court is limited as follows:

---

[1] Appeals from final judgment of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal. The Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts. The Appellate Court may exercise original jurisdiction when necessary to the complete determination of any case on review. The Appellate Court shall have such powers of direct review of administrative action as provided by law.

> "The office of the appellate court is to review rulings, orders or judgments of the court below, contained in the record, and matters not ruled upon by the inferior court are not subject to the consideration of the appellate court unless the lower court's failure to rule is made the subject of an assignment of error, in which case the propriety of such failure is the question presented to the appellate court and not the merits of the matter upon which the trial court refuses to act."

32 N.E.2d at 897. The Court in *Sprague v. Goodrich, supra* went on to say that "in other words, the appellate court's jurisdiction is appellate, and *extends only to those matters in controversy which have been ruled upon by the trial court.*" [Emphasis supplied]. *Id.*

To the same effect are the appellate court opinions in *Board of Education of Chicago v. Chicago Teachers Union,* 26 Ill.App.3d 806 (1st Dist. 1975) and *Edelman v. Lee Optical Co.,* 24 Ill.App.3d 216 (1st Dist. 1974). Both those decisions construed present Article VI, §6 of the Illinois Constitution (1970). In *Chicago Teachers Union, supra,* the court said:

> "our function as an appellate court is to review the rulings, orders, or judgments of the court below, those contained on the record. Issues which the trial court has refused to decide will not be considered by us unless we are asked to decide whether the refusal was an abuse of judicial discretion. In such case, we should not have before us the merits, if any, of the issues on which the trial court refused to act. Our jurisdictionis, in the first instance, appellate; it extends only to those matters in controversy which have been passed upon by the trial court (citing *Sprague v. Goodrich, supra*). Jurisdiction cannot be conferred upon us by the parties or by the failure of any one of them to call to our attention a jurisdictional defect (citing *In Reorganization of the Fox Valley Community Airport Authority,* 23 Ill.App.3d 168, 318 N.E.2d 496).

26 Ill.App.3d at 813.

The predecessor to ARticle VI, §6 of the Constitution of 1970, Article VI, §7 of the Constitution of 1870 which was construed by the *Sprague v. Goodrich, supra* court did not contain any provision for the exercise by the appellate court of original jurisdiction. Effective January 1, 1962, however, the 1870 Constitution was amended to provide for the exercise by the appellate court of "such original jurisdiction as may be necessary to the complete determination of any cause on review." SHA Constitution (1870) Article VI §7. See *Franks v. North Shore Farms Inc.,* 115 Ill.App.2d 57, 73-74. However, that provision is generally restricted to permitting an appellate court pass upon post-trial motions actually filed in the circuit court but which are not, for whatever reason, acted upon by the circuit court. See *Franks v. North Shore Farms Inc.,* 115 Ill.App.2d 57 at 73-74 (1st Dist. 1969). Moreover, as the Appellate Court observed in *People v. Love,* (1972), 6 Ill.kApp.3d 572, 582, the appellate court has no authority to "consider matters not properly before (the appellate) court on appeal and matters never presented or considered for any purpose by the trial court . . . (are not properly before the appellate court)." Also, as stated hereinabove the appellate court in *Board of Education v. Chicago Teachers Union, supra* and *Edelman v. Lee Optical Co., supra* construed the present Article VI, §6 of the 1970 Constitution containing the provision for original jurisdiction "as may be necessary to the complete determination of any cause in review" and concluded as did the Supreme Court in *Sprague v. Goodrich, supra* that the essential jurisdiction of the appellate court is appellate jurisdiction and does not extend to reviewing matters which the trial court has not ruled upon.

Ill. Rev. Stat. Chapter 110A §366(b)(2)(iii) provides that in jury cases "a party may not urge as error on review of the ruling on his post-trial motion any point, ground, or relief not specified in the motion." In turn, *Ill. Rev. Stat.* Chapter 110 §2-1202(a) prescribes that in the event a party has moved for a

directed verdict at the close of the evidence before the case has been submitted to the jury, that motion "is waived unless the request is renewed in the post-trial motion." Then, *Ill. Rev. Stat.* Chapter 110 §2-1202(b) specifies that "the post-trial motion must contain the points relied upon, *particularly specifying the grounds in support thereof,* and must state the relief desired, as for example, the entry of judgment, the granting of a new trial, or other appropriate relief." [Emphasis supplied]. Those provisions have been conclusively interpreted by the Court in *Brown v. Decatur Memorial Hospital,* 83 Ill.2d 344 (1980) to preclude an appellate court reviewing on appeal any matter not specifically preserved in the post-trial motion. This court said in *Brown*

> "the purpose of the post-trial motion specificity rule is three fold. First, it allows the decision maker who is most familiar with the events of the trial, the trial judge, to review his decisions without the pressure of an ongoing trial and to grant a new trial if, on reconsideration, he concludes that his earlier decision was incorrect. (Citing cases). Second, by requiring the statement of the specific grounds urged as support for the claim of error, the rule allows a reviewing court to ascertain from the record whether the trial court has been afforded an adequate opportunity to reassess the allegedly erroneous rulings. Third, by requiring the litigants to state the specific grounds in support of their contentions it prevents them from stating mere general objections and subsequently raising on appeal arguments which the trial judge was never given an opportunity to consider. (Citing cases). The rule, which is not limited to questions concerning jury instructions, has the salutary effect of promoting both the accuracy of decision making and the elimination of unnecessary appeals."

83 Ill.2d 344 at 349-50.

The record in this case is clear that there was no motion filed by the bank at pleading stage in the circuit court attacking the legal sufficiency of Count I of Landers' Counterclaim alleging breach of contract. The Circuit Court, therefore, had no opportunity to address that issue. At the close of the evidence, the record does indicate that the bank orally moved for a directed verdict "in connection with the Counterclaim of Landers Seed Co., Inc." Transcript 562. Also, the bank filed a written motion at the close of all the evidence for a directed verdict on Landers' Counterclaim on the grounds that "the evidence and exhibits offered by (Landers) wholly failed to establish the existence of any damages to (Landers) which was proximately caused by the alleged breach of contract on the part of the (bank)." C-563, 564. The Court denied those motions. C-562, T-562.

But, the record is clear that as required by *Ill. Rev. Stat.* Chapter 110 §1202(a), no post-trial motion was filed by the bank seeking judgment notwithstanding the verdict in the circuit court under the standard of *Pedrick v. Peoria and Eastern RR Co.*, 37 Ill.2d 494 (1967) for the reason that the evidence was insufficient as a matter of law to establish a contract. C-652-53, 682-85. The record further reveals that the bank did not file a post-trial motion for judgment notwithstanding the verdict under the *Pedrick, supra* standard pursuant to *Ill. Rev. Stat.* Chapter 110 §2-1202(b) alleging that the evidence was insufficient as a matter of law to establish the existence of a contract. *Id.* The bank did not file a motion for a new trial on the ground that the verdict of the jury in favor of Landers was against the manifest weight of the evidence as required by *Ill. Rev. Stat.* Chapter 110 §2-1202(b). C-652-653, 682-85.

Rather, the only positions taken by the bank in its post-trial motion were (i) that the parol evidence rule precluded the introduction into evidence of the oral agreement alleged by Landers whereby the bank agreed to delay enforcing its rights under the promissory notes in consideration of Landers' agree-

ment to execute those documents creating a direct relationship between it and the bank, C-652-653, 682-83; (ii) that Landers' evidence in support of its damages was legally insufficient by reason of being "remote, speculative, and not reasonably related to restoring (Landers) to the position it would have had if the alleged oral contract had been fully performed by the bank," C-652-53, 683-84; (iii) that Landers "failed to produce any evidence indicating that the damages sustained by (Landers) were reasonably foreseeable by the bank or that the actual failure of (Landers') business was proximately caused by the bank's breach of the alleged oral agreement," C-653, 683; and (iv) that the Circuit Court erred in giving Landers' Instruction No. 23 permitting the jury to consider various items of damage, C-684-85.

The Circuit Court's ruling on the bank's post-trial motion addressed itself to the applicability of the parol evidence rule and denied the bank's motion in that respect. C-708. Also, the Circuit Court addressed and denied the bank's post-trial motion respecting damages, indicating that the damage verdict on the counterclaim in Landers' favor was "within the range of the evidence presented." C-708. Nothing else was ruled upon by the Circuit Court. No other issues were preserved by the bank. That being the case, this Court had no authority to determine whether there was or was not sufficient evidence of contract as that question was not before it.

Moreover, the bank in its Brief presented to this Court, argued precisely in accordance with its post-trial motion. In subsection A of the argument portion of its brief beginning at Page 13, the bank argued that "the trial court erred by permitting the jury to hear certain testimony in violation of the rule prohibiting parol evidence." In its argument under heading B on Page 19 of its Brief, the bank argued that "the trial court erred in not vacating the verdict of the jury as to Count I of the Counterclaim *due to the insufficiciency of the evidence in establishing that the bank's breach of contract caused the*

failure of Landers Seed Company Inc.," [Emphasis supplied]. The bank's argument under heading C at Page 20 of its Brief was that "the trial court erred in giving Defendant's Instruction No. 23 which allowed the jury to consider inappropriate items of contract damages." The bank's last argument in its Brief before this Court was that "the trial court did not err in denying the post-trial motions of Landers Seed Company Inc.," appearing at Page 21 of its Brief. The body of the bank's arguments in the foregoing respects was in strict accordance with the aforedescribed headings. Brief of Appellee-Cross-Appellant Pages 13-23.[2]

By reason of the issue of the sufficiency of the evidence of contract not having been preserved and ruled upon by the Circuit Court in the post-trial motion stage, that issue was not before this Court by force of Ill. Const. (1970) Article VI §6. *Sprague v. Goodrich, supra; Board of Education of Chicago v. Chicago Teachers Union, supra; Edelman v. Lee Optical Co.,*

---

[2] The Appellate Court suggested at page 5 of its Opinion that the bank may have made an argument in its Brief before this Court to the effect that there was not sufficient evidence "for a jury determination of the fact issue relating to the contract count (of Landers' counter-complaint)." That is simply not accurate. The closest the bank came in its brief to saying anything remotely along those lines is the last clause of the last sentence in the first full paragraph on Page 17 where the bank says "and the bank never did anything to indicate or otherwise imply that it was not going to enforce the promissory note according to its terms." However, assuming that is the argument to which the Appellate Court was alluding in its opinion, that argument was never made in the bank's post-trial motion and therefore was not properly before that Court on appeal.

The other argument of the bank under its heading B to the effect that the trial court erred in not vacating the verdict of the jury as to Count I of the counterclaim refers specifically to the issue of damages, not to the existence or non-existence of the contract. Therefore, even if the bank were correct in this argument, the Appellate Court would have been empowered to only reduce the amount of damages to a nominal award of $1.00 and not vacate the verdict finding the existence of a contract and its breach by the bank.

supra. Moreover, as this Court acknowledges in its opinion, the bank by competent and experienced counsel, admitted that there was sufficient evidence to support the jury verdict finding that there was a contract. Opinion Page 5. This Court's conclusion, therefore, that there was insufficient evidence of contract is void as being an attempted exercise of original jurisdiction which this Court does not possess under the Constitution. Ill. Const. (1970) Article VI, §6; *Sprague v. Goodrich, supra; Board of Education of Chicago v. Chicago Teachers Union, supra; Edelman v. Lee Optical Co., supra.*

Last, the issue of the sufficiency of the evidence to support the existence of the contract between Landers and the bank was not preserved in the bank's post-trial motion. This Court's decision that the evidence, as a matter of law was insufficient to support a finding of the existence of a contract is, therefore, improper as beyond the scope of this Court's statutory authority of review. *Ill. Rev. Stat.* Chapter 110A §366(b)(2)(iii); *Ill. Rev. Stat.* Chapter 110 §1202(a) and (b); and *Brown v. Decatur Memorial Hospital,* 83 Ill.2d 344 (1980).

II.

This Court Misapprehended Its Authority In Concluding That "The Jury Verdict In Favor Of Landers And Against The Bank Was Against The Manifest Weight Of The Evidence" In That That Issue Was Not Preserved In A Post-Trial Motion, Was Not Ruled Upon By The Circuit Court, And Was Not Argued On Appeal And, Therefore, This Court Had No Power Under Ill. Constitution (1970), Article VI §6 And *Ill. Rev. Stat.* Chapter 110A §366(b)(2)(iii) To Decide The Issue.

The Appellate Court's conclusion that "the verdict finding that Plaintiff violated terms of the alleged contract was against the manifest weight of the evidence" suffers the same infirmities as does its conclusion that there was insufficient evidence of a

contract. The record is clear in this case that the bank did not in its post-trial motion seek either a judgment notwithstanding the verdict under the *Pedrick, supra* standard or a new trial on the ground that the "verdict finding that the Plaintiff violated the terms of the alleged contract was against the manifest weight of the evidence." C-652-53, 682-85. The Circuit Court, therefore, never ruled on that issue. C-708-09.

Rather, as stated above, the only arguments made by the bank in its post-trial motion were that the circuit court erred in admitting parol evidence as to the oral agreement, that the damage evidence was too remote and speculative to sustain the $60,833.31 verdict, and that the Circuit Court erred in giving Landers' Instruction No. 23. Those were the only questions ruled upon by the Circuit Court in response to the bank's post-trial motion. Therefore, the argument stated hereinabove respecting the Appellate Court's conclusion that there was insufficient evidence of a contract is applicable here with full force and is incorporated herein.[3]

Moreover, the Appellate Court concluded that the bank exercised "sound business judgment" in terminating the credit and that Charles Landers "had used poor judgment in overvaluing

---

[3] It seems the only way the Appellate Court could have jurisdictionally reached the result it has reached in this case would be to conclude that the bank was correct in its parol evidence argument. However, to reach that result, the Appellate Court would have had to discount the customary law relative to the parol evidence rule as set forth in Landers' Reply Brief Pages 3-8.

Also, if the Appellate Court were to have concluded that the bank was correct respecting its damage argument which was preserved in its post-trial motion, that would mean only that the verdict as to the amount of damages could be set aside, in which case as Landers' Instruction No. 23 specifically provided, the jury would have been entitled to enter a nominal verdict. However, that would leave intact the jury's finding as a matter of fact the existence of the contract and the breach thereof by the bank.

inventory for purposes of determining 1982 losses." Opinion Page 13. Those statements appear beyond the scope of any pleadings or evidence in this case.

It seems unnecessary for this Court to reach out and make gratuitous comments concerning the character of Charles Landers respecting the valuation of inventory when no evidence ever suggested anything untoward in that respect. Further, it seems unnecessary for this Court to call the actions of the bank "reasonable and justifiable even if an agreement had existed", thereby seeming to give judicial sanction to a breach of contract if such breach might seem wise as a matter of business judgment in this Court's opinion. "Good business judgment" does not give rise to the discharge of a contractual duty. 5A Corbin on Contracts (1964) §§1228-1229, Pages 506-510; 6 Corbin on Contracts §1261 (1964); *Restatement 2d of Contracts* §§261-272 (1981).

III.

Even If The Appellate Court Had Had The Authority To Conclude The Verdict In Favor Of Landers Was "AGainst The Manifest Weight Of The Evidence", Which It Did Not, The Remedy Was To Order A New Trial, Not To Enter Judgment NOV

Ill. Rev. Stat. Chapter 110 §2-1202(b) permits a party after a trial in a jury case to seek either judgment NOV or a new trial. The rule established in *Pedrick v. Peoria and Eastern RR Co.*, 370 Ill.2d 494 (1967) is that a judgment NOV can be "entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Pedrick, supra,* 37 Ill.2d 494 at 510.

However, assuming the issue of sufficiency of evidence has been preserved, when an appellate court, as the Appellate Court

did in this case, concludes that the jury verdict is against the manifest weight of the evidence, the remedy is a new trial. *Corcoran v. City of Chicago,* 373 Ill. 567, 27 N.E.2d 451 (1940); *Mizowek v. DeFranco,* (1976), 64 Ill.2d 303, 310; *Pedrick v. Peoria and Eastern RR Co.,* 37 Ill.2d 494 (1967); *Heuer v. Goldberg,* 106 Ill.App.2d 555, 61 (1st Dist. 1969); *Spankroy v. Alesky,* 45 Ill.App.3d 432 (1st Dist. 1977). See also for e.g. *Snedden v. Levenka,* 92 Ill.App.3d 979, 460 N.E.2d 1097. There is no authority for a court under a standard less than that enunciated by the Illinois Supreme Court in *Pedrick, supra* being empowered to enter judgment NOV. It may do so under *Pedrick* only when the issue has been properly preserved. *Ill. Rev. Stat.* Chapter 110 §2-1202(b). *Brown v. Decatur Memorial Hospital, supra.* See also *Gallick v. Novotney,* 124 Ill.App.3d 756 (3d Dist. 1984).

The issue of sufficiency of the evidence was not, as has been demonstrated, preserved in this case. But, even if it had been, the appropriate remedy was for the Appellate Court to order a new trial, not enter judgment.

IV.

Even If The Appellate Court Had The Authority To Decide (i) The Sufficiency Of The Evidence Of Contract And (ii) The Sufficiency Of The Weight Of The Evidence In Support Of The Jury Verdict That The Bank Had Breached The Contract, Which It Did Not, The Appellate Court's Opinion Misapprehended The Nature Of The Contract Pleaded And Proved By Landers; It Misapprehended The Nature And Effect Of The Participation Agreement Between The Champaign And Sullivan Banks; And It Misapprehended The Law Of Waiver And Its Applicability To The Instant Case.

A. Nature of the Contract Pleaded and Proved

The Appellate Court in its opinion at Pages 1, 3, 5, 7, and 8 indicated to the effect that the agreement pleaded and proved by

Landers was to "borrow money in the future." That is incorrect. The agreement pleaded and proved by Landers in this case was one whereby the Champaign National Bank agreed to forebear collecting an indebtedness which was existing and outstanding as of August 23, 1982 and participated to it by the First National Bank of Sullivan in consideration of Landers entering into a direct relationship with the Champaign National Bank. Paragraphs 1 and 2 of Count I of Landers' Counterclaim, C-130-137; Landers' tendered instructions on waiver and breach of contract, C-618; 622-624; 627, 629-630; Reporter's Transcript 591-600; and C-629-630 make this clear. Landers' Brief at Pages 9 and 10 further makes this clear. The testimony of Lee O'Neill under cross-examination at Reporter's Transcript 439-440 and 443-445 further makes this point. At no time did Landers ever claim that the bank agreed to lend money in the future. The bank never at trial or before this Court suggested that the nature of the contract was other than one for forebearance.

The Appellate Court appears to suggest that "an agreement to continue to refinance or roll over a debt appears similar to an oral contract to lend money in the future." Opinion Page 5. Upon what basis the Appellate Court made this statement is not clear. However, the fact of the matter is that in the instant case there was no agreement alleged or attempted to be proved whereby Landers said that the bank agreed to lend money in the future. Therefore, the Appellate Court's attempt to base its opinion on the First District's language in *McErlean v. Union National Bank* (1980) 90 Ill.App.3d 1141 and this Court's recent opinion in *McClellan v. Banc Midwest* (December 31, 1987, 4th Dist. Gen. No. 4-87-0305) is simply misplaced.

The terms of the agreement aileged, proved and accepted by the jury were that in consideration of Landers entering into a direct relationship with the bank and pursuant thereto executing promissory notes in favor of the bank for the indebtedness that was already outstanding to the First National Bank of Sullivan

and participated to the Champaign National Bank, the bank agreed to forebear collecting on such promissory notes so long as Landers made reasonable progress toward profitability, made monthly reports to the bank, paid the interest on the indebtedness as it became due, and reduced the principal balance of the indebtedness. That was the undisputed thrust of Charles Landers' testimony. It was also, with the exception of the three year period, the undisputed thrust of Lee O'Neill's testimony. T-439-440; 443-445. All other occurrence witnesses to the August 23, 1982 meeting corroborated Landers' and O'Neill's testimony in this respect. See testimony of Jan Hagen T-325-328 and Robert Elder, T-477-479, 493-494 in this respect.

After incorrectly stating the nature of the contract involved, the Appellate Court then argued that its terms were too indefinite to constitute a contract. For example, the Court asked rhetorically respecting the "progress toward profitability" condition of the bank's agreement to forebear for the period up to three years, "who was to be the judge of that progress?" As this Court is aware, the implied covenant of good faith and fair dealing applies to the construction of contracts in Illinois. *Martindell v. Lake Shore National Bank,* 15 Ill.2d 272 (1958); *Foster Enterprises v. Germania Federal Savings & Loan Assoc.,* 97 Ill.App.3d 22 (3d Dist. 1981); *Carrico v. Delp,* 141 Ill.App.3d 684, 689-90 (4th Dist. 1986). *Restatement 2d of Contracts* §205 (1981). Indeed, the Appellate Court in its opinion seized the opportunity to indicate that "an obligation of good faith was imposed on the Sullivan Bank in its participation dealings with the Champaign National Bank", (Slip Opinion Page 9), where the application or nonapplication of the implied covenant of good faith and fair dealing was not an issue in this case.

With respect to the "progress toward profitability" aspect of the bank's agreement to forebear, the law is that "good faith between contracting parties requires that a party vested with contractual discretion must exercise its discretion reasonably and may not do so arbitrarily or capriciously." *Foster Enter-*

prises v. Germania, supra, 97 Ill.App.3d 22 at 30. The bank obviously had the power to exercise discretion as to whether or not Landers was making sufficient progress toward profitability. The evidence in the case showed that ten months after the August 23, 1982 agreement was entered into, Landers was showing progress from a loss of $854,492 for the fiscal year ending June 30, 1983 to either an $800 profit or a $73,000 loss for the fiscal year to end June 30, 1984. Either one of those projections according to the testimony of Landers' CPA was a reasonable forecast. Either one, under any conceptualization of the "progress toward profitability" condition, would reasonably require one to say that progress toward profitability had been made. Lee O'Neill in his testimony specifically admitted that fact as follows:

> **Question:** Mr. O'Neill, any way you cut it, let's talk about the $73,000 loss, that's an improvement, is it not, sir, over the $350,000 loss? Isn't that right?
>
> **Answer:** Yes.
>
> **Question:** And that $800 profit is an even better improvement, is it not?
>
> **Answer:** It is but you also have to look at the balance sheet of the corporation.

Reporter's Transcript Page 456-457. O'Neill further testified that he had no doubts about Nick Piraino's credentials or abilities as a CPA. Transcript Page 457. Piraino testified that either one of those projections was reasonable. Transcript 252, 253, 266.

In its opinion at Page 7, the appellate court faulted the contract proved by saying that "(n)o cost of money terms were included in the alleged agreement; no terms exist as to additional capital advanced or duration of loans; maturity dates were not provided; mode or rate or repayment was not comtemplated." However, those elements simply have no bearing on an agree-

ment to forebear collecting an existing outstanding indebtedness. There were to be no additional capital advances. The duration of the forebearance was up to three years. The mode of repayment was payment of interest every 120 days. Repayment on principal was to begin either when the company attained profitability or upon the expiration of three years, whichever occurred first. Moreover, there was to be some reduction in the principal balance pursuant to unspecified schedule during the three year period. This Landers more than did. Defendant's Exhibits 6 through 9 inclusive; Transcript 18, 217-225; 463-466; Landers' Brief Page 11. The bank nowhere disputed any of those elements except the three year duration of the bank's agreement to forebear. But, the bank did not raise any dispute it had in that respect in its post-trial motion.

B. The Participation Agreement.

In attempting to discount Landers' waiver theory as a defense to the suit on the note, the Appellate Court said "the argument that Plaintiff (Champaign National Bank) did not have effective remedies (pursuant to the Participation Agreements) against Defendant and guarantees prior to August 23, 1982 is not established by the evidence and is without merit." Opinion Page 9. The Court's evident purpose in so saying was to show that Landers gave up nothing by entering into the direct relationship with the Champaign National Bank on August 23, 1982 and, therefore, there was no consideration for the bank's agreement to forebear collecting on the notes. However, the Appellate Court's statement in that respect overlooked all the evidence and the applicable law. Moreover, consideration is not required to establish waiver. 3A Corbin Contracts §752 Pages 480-81 and the cases cited in Landers' Opening Brief Pages 22-25, and 28, none of which was in any way disputed by the bank. No Illinois case suggests that to establish a waiver, consideration must be shown. Indeed, that is contrary of the general law of waiver.

The Transcript at Pages 24 through 29, 31, 34, 40, 352, and 421-423, was unequivocal and explicit to the effect that it was the *bank's* desire to end the participation arrangement and enter into the direct relationship with Landers because it perceived that it had no rights against Landers under the participation agreements and because it was concerned about the possibly deteriorating financial condition of Landers. The bank's own brief before the Appellate Court at Page 4, Paragraph No. 7 specified the desire of Champaign National Bank to restructure the loan that existed prior to August 23, 1982 so as to create a direct relationship. No hint to the contrary exists anywhere in the record before the Appellate Court.

In support of its conclusion which evidences a manifest misapprehension of the record, the Appellate Court said at Page 9 that "the only evidence that the participation agreement between First National Bank of Sullivan and Champaign National Bank is Defendants' Exhibit No. 12, which is a certificate of participation dated October 8, 1981 . . . (relating) to a $120,000 payment of Champaign National Bank's participation to a loan of $120,000 made to Landers Seed Co. evidenced by a note dated October 8, 1981." However, the testimony is explicit at Transcript Pages 24, 25, 29, and 31 that Exhibit No. 12 was imply a facsimile showing the nature of the participation relationship between the First National Bank of Sullivan and the Champaign National Bank. The particular reference to a specific loan in that Exhibit had no bearing in this case. Rather it is the format and the boiler plate language of the Exhibit which indicate the nature of the participation relationship between the Champaign and the Sullivan banks.

For example, at Page 24 Landers' counsel in questioning Jan Haegen, the former officer of the First National Bank of Sullivan responsible for creating the participation relationship with the Champaign National Bank, elicited the following testimony:

Question: That Exhibit 12 does not purport to be, Mr. Haegen, the entirety of the Landers Seed Co. business that you dealt to Champaign National Bank?

Answer: No it does not.

Question: It said here it is dated October 8, 1981, you are familiar with this basic controversy, are you not?

Answer: Yes.

Question: This date does not have anything to do with this controversy, does it?

Answer: No it does not.

Question: *This form basically just sets forth the form that you used in dealing with Champaign National Bank, does it not?*

Answer: *That is correct, right.*

Question: Are the terms in this form similar to all other participation agreements that you use with Champaign National Bank in relation to the Landers' account?

Answer: Yes, they are.

Transcript Pages 24, 25. [Emphasis supplied]. Further, the following colloquy occurred:

Mr. Bisbee: I would move for the admission of Exhibit 1 (meaning 12).

The Court: Has it been previously admitted:

Mr. Bisbee: I guess it was. 12, pardon me, I am sorry. Exhibit 12 which is the —

Mr. Evans: *Facsimile.* I have no objection.

The Court: Defendants' 12 admitted, no objection.

Transcript Page 29. [Emphasis supplied]. Additionally the following occurred:

> **Question:** (By Mr. Evans on behalf of Champaign National Bank) Did you have essentially the same relationship with them insofar as the participation certificate is concerned that you had with Champaign National Bank?
>
> **Answer:** I believe so.
>
> **Question:** Whose, going back to the facsimile (Defendant's Exhibit 12), the one dated in 1981, Mr. Haegen, whose document is that? Is that yours or does the bank you are farming the loan off to, do they provide that document?
>
> **Answer:** On this case we provided the document.
>
> **Question:** Would you please take another look, if you would, at that document which has been marked Certificate of Participation and is Defendant's Exhibit 12, so that's a document that you would have either provided or prepared in house, completed and then shipped out to the bank that was buying participation from you, is that correct?
>
> **Answer:** That is correct.

Transcript Pages 30-31.

Regardless of whatever obligations the First National Bank of Sullivan may have had under the participation agreement to Champaign National Bank, the fact of the matter is that under the participation agreement, the Sullivan Bank was the one reposed with the complete discretion to attempt to collect or not to collect as it so chose. Landers Exhibit 12. The Champaign Bank was aware of that as evidenced by the testimony of Lee O'Neill set out below. Because it was aware of that, it undertook to establish a direct relationship with Landers because it was concerned about the condition of the credit and it did not

want to be dependent upon whatever management decisions the First National Bank of Sullivan made respecting collection. At Page 352 of the Transcript, under questioning by the bank's counsel, O'Neill testified as follows:

> **Question:** Would you please tell us how it happened that you became involved with the corporation on that date (meaning August 23, 1982)?
>
> **Answer:** While I was on vacation, Steve Vandenberg had had two meetings with the Landers and based on those meetings, — the — *Steve and the management of the bank determined that it was necessary to take the credit previously from a participation of the First National Bank to a direct obligation to Champaign National Bank.*

Furthermore:

> **Question:** (By Mr. Evans) What did you say when you commenced the meeting?
>
> **Answer:** I indicated that the previous relationship in the form of the participating being purchased was no longer acceptable to the Champaign National Bank *in that it was necessary for us at that time (to) develop a direct loan relationship with the Landers corporation.*

T-352. [Emphasis supplied]. O'Neill later testified under cross-examination:

> **Question:** Prior to August 23, 1982, the only rights that Champaign National Bank had were against the First National Bank of Sullivan, isn't that right?
>
> **Answer:** Unless we bought the notes.

T-422.

The Appellate Court's conclusion, therefore, that the record did not establish that Champaign did not have effective

remedies against Landers prior to August 23, 1982 palpably misapprehended the record before that Court. Moreover, the Court misapprehended its authority by even suggesting that Landers had the burden to establish that the bank had no rights against it when that has never even been a contested issue in this case raised by the parties or ruled upon by the circuit court. Illinois Constitution Article (1970) VI, §6; *Sprague v. Goodrich, supra; Chicago Board of Education v. Chicago Teachers Union, supra; Edelman v. Lee Optical Co., supra; Ill.Rev.Stat.* Chapter 110A §366(b)(2)(iii).

Moreover, even if the bank did have rights of which it was totally unaware against Landers, the undisputed fact of the matter is that the loan agreement pursuant to which the bank brought suit in this case was established on August 23, 1982 at the bank's insistence. On that date, the direct relationship was established with Landers pursuant to which the unequivocal evidence is that Landers agreed to enter into that direct relationship only after it secured the agreement by the bank to forebear collecting on the notes executed pursuant to the creation that direct relationship. Landers did not have to enter into that relationship. But, O'Neill indicated that he did not intend to put Landers out of business; rather that he wanted to "work with the seed company". Transcript 72, 438-440, 443-445. He also said that Champaign National Bank was willing to work with Landers so as to get Landers back to profitability or to get a reasonable chance for profitability. T-71, 439, 440. He indicated, according to Charles Landers, that the seed company's attained profitability could take up to three years. T-71, 154, 327. O'Neill's tone was positive and he showed confidence in Charles Landers. T-327.

Thus, the direct relationship that the Champaign National Bank established with Landers on August 23, 1982 and pursuant to which it was able to create the December 21, 1982 note upon which it brought the instant lawsuit, came about only after Landers was told explicitly and was satisfied that the bank was

in agreement to work with it and forebear collecting on the indebtedness for a period of up to three years. The bank perceived that it had no rights prior to August 23, 1982 directly against Landers. Landers was not agreeable to permitting the creation of any such direct rights without the bank's agreement to forebear. And the direct relationship and the agreement to forebear came to be on August 23, 1982.

The Appellate Court's conclusion, therefore, respecting the participation agreement and whatever rights Champaign National Bank may have had directly against the Landers prior to August 23, 1982 simply doesn't make any difference. The fact of the matter is Champaign National Bank did not perceive that it had any such rights and undertook to create the direct relationship that ultimately culminated in the instant lawsuit. The record is unequivocal in that respect. No party disputes it.

C. The Appellate Court Misapprehended The Law of Waiver.

The foregoing discussion relative to the nature of the participation agreement and the parties' respective perceptions of their rights pursuant thereto bear upon the applicability of the law of waiver and the Appellate Court's discussion of it. In its opinion at Pages 9 and 10, the Court said Landers "would have us recognize the waiver of the right to collect an obligation based on the theory that Plaintiff received consideration in the nature of Defendant allowing a direct relationship between Defendant and Plaintiff."[4] The Court then at Page 9 indicated that Champaign National Bank already had effective direct rights against Landers prior to August 23, 1982. That, however, is already shown to be both irrelevant and incorrect. The Court

---

[4] Landers did not argue that the consideration was necessary for establishing waiver. Rather, the consideration was necessary for proving the contract pursuant to which the bank agreed to forebear collecting on the indebtedness as above discussed.

then proceeded to cite at Page 10 *Restatement 2d of Contracts* §84, Comment d purporting to show that the law of waiver relates only to so-called "technical conditions" which this Court concludes could not refer to the "right to collect a debt when due." Opinion Page 11. Based on that analysis, the Court said that "waiver cannot apply to the facts and evidence in the present case." That is manifestly incorrect and overlooks or misapprehends both the evidence in this case and the law that has been cited to the Court by Landers and is not disputed by the bank.

Most importantly, in citing *Restatement 2d of Contracts* §84 Comment d, the Appellate Court overlooked the fact that §84 *Restatement 2d* by its very terms refers to a promisor's waiver of defenses it may have which are "*not addressed to the merits . . .*" *Restatement 2d* §84, Comment a. [Emphasis supplied]. Rather, it relates, by its own terms to a promisor's promise to perform a conditional duty under a contract in light of the non-occurrence of the condition, which promise remains binding *unless the occurrence of the condition was a material part of the agreed exchange. Restatement 2d* §84(1)(a). [Emphasis supplied]. By its own terms, therefore, *Restatement 2d* §84 has nothing to do with the instant case and does not purport to state a general law of waiver where the condition waived is a *material* part of the agreed exchange.

Where the condition waived is material, *Restatement 2d of Contracts* §84, Comment c refers to *Restatement 2d of Contracts* §89 entitled "Modification of Executory Contract" which provides that "a promise modifying a duty under a contract not fully performed on either side is binding . . . (c) *to the extent that justice requires enforcement in view of material change of position and reliance on the promise.*" [Emphasis Supplied]. In Comment a to *Restatement 2d* §89 which gives the rationale for the section, the authors say that "this section is also related to §84 on waiver of conditions: *it may apply to cases in which* §84 is inapplicable because the condition is material to the exchange

or risk." [Emphasis supplied]. Moreover, the case law upon which Landers relied and the Appellate Court did not question does not draw the material — nonmaterial distinction as does the *Restatement* in §§84 and 89. As demonstrated below, Corbin does not draw that distinction either.

In this case, Landers pleaded and proved and the jury accepted that the bank in consideration of Landers agreeing to the establishment of a direct relationship, agreed to modify whatever duty Landers had to pay within 120 days on the notes. In reliance on that promise, Landers signed the documents creating the direct relationship between it and the bank. The bank's agreement to forebear was a waiver of a material condition to the agreed exchange — a waiver of the right under the note of August 23, 1982 and renewals thereof to be paid within 120 days so long as Landers performed as agreed, i.e. made progress toward profitability, paid interest, submitted reports, and reduced the principal balance. O'Neill testimony Page 438-440, 443-445.

Thus, the position adopted by the *Restatement* authors in §89 is fully consistent with the position set forth in Landers' Opening Brief at Pages 20 and 21 in which it cited 3A Corbin §752 (1960) to the effect that

> "if the vendor offers to eliminate the conditionin exchange for a requested consideration, and the purchaser gives that consideration, the case can still be described as a 'waiver'; but it is also a modification by mutual agreement — by a substituted contract — a modification that is not subject to retraction by the vendor".

3A Corbin, *Id.* §752 at 481. Therefore, the entire predicate of this Court's argument, to wit *Restatement 2d of Contracts* §84, to the effect that Landers is not entitled to a waiver overlooks the fact that *Restatement 2d of Contracts* §84 dovetails with *Restatement 2d of Contracts* §89. That section in turn stands for the same proposition as Corbin, *supra* which formed the

analytical basis for Landers' argument in its Brief, that a waiver had been established in this case as a matter of law. Landers reasserts that position as it is fully supported by the evidence and the applicable law.

Moreover, *Restatement 2d* §84 Comment a specifically refers to *Restatement 2d* §90 entitled "Promise Reasonably Inducing Action Or Forebearance". In subsection 1 to *Restatement 2d* §90 subsection 1, the American Law Institute authors state "a promise which the promisor should reasonably expect to induce action or forebearance on the part of the promisee or a third person and which does induce such action or forebearance is binding if injustice could be avoided only by enforcement of the promise." As stated in Footnote 6 appearing at Page 22 of Landers Brief, *Restatement 2d* §90 is the general language associated with promissory estoppel. It clearly applies to the facts of this case. The banks promise to forebear collecting for a period of up to three years reasonably induced Landers' action in permitting the creation of the direct relationship between it and Champaign National Bank.

V.

This Court's Opinion In Concluding (i) "Insufficient Evidence Of Contract" And Entering Judgment NOV On That Basis And (ii) That The Jury's Verdict In Favor Of Landers "Was Against The Manifest Weight Of The Evidence", Deprived Landers Of Its Right To Jury Trial Guaranteed Inviolate By The Ill. Constitution (1970) Article I §13 And Thereby Deprived Landers Of The Necessarily Inconsistent Verdict Relative To The Verdict In Favor Of The Bank On The Promissory Note, Which Inconsistency Requires A New Trial.

The Illinois Constitution (1970) Article I, §13 provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." According to the innumerable cases which have construed that section, Article I, §13 of the Illinois Constitution

(1970) is generally construed to mean that the right of trial by jury as it existed at common law and which was enjoyed at the adoption of the several constitutions in Illinois shall remain inviolate. See for example *Zurich Insurance v. Raymark Industries,* (1987) 118 Ill.2d 23, 57; *Stevens v. Kasten* (1943) 383 Ill. 127, 48 N.E.2d 508; *Cobin v. Illinois Pollution Control Board* (1974) 56 Ill.2d 582, 401 N.E.2d 1390; *People v. Woerly* (1917) 50 Ill.2d 327, 278 N.E.2d 787. An action on a contract, including a promissory note seeking damages is an action which existed at common law in which the right to trial by jury has historically been enjoyed. *Baber v. Rardin Grain Co.,* 6 Ill.App. 63, 126 N.E.2d 529 (1955); *Construction Aggregates Corp. v. Hewitt Robins, Inc.,* 404 F.2d 505, 509 (7th Cir. 1968), citing *Rankin v. Fidelity Ins.,* 189 U.S. 242, 252-53; 3 Corbin on Contracts (1964) §554 at Pages 226-227; *Meyers v. Selznick Co.,* 373 F.2d 218, 223 (2d Cir. 1966);

As demonstrated under the first heading in this Petition for Rehearing, the Appellate Court, without having had the question presented to it or having had the circuit court consider the issue, sua sponte determined that there was insufficient evidence adduced by Landers to sustain the existence of a contract. The Appellate Court further, without having had the question presented to it by the Bank and without having had the benefit of the circuit court address the issue, decided sua sponte that the verdict in favor of Landers and against the bank that the bank had breached its contract with Landers was against the manifest weight of the evidence. In so deciding those issues sua sponte, the Appellate Court exercised original jurisdiction which, as was demonstrated in the first part of this Petition, it had no constitutional authority to do. Article VI, §6 of the Illinois Constitution (1970); *Sprague v. Goodrich,* 376 Ill. 80, 32 N.E.2d 897 (1941).

By reason of the foregoing, the Appellate Court deprived Landers the benefit of the jury verdict in this case by acting in excess of its constitutional authority and by acting in derogation

of the Supreme Court Rules in taking Landers' jury verdict away from it. As a result, this Court has deprived Landers the benefit of the guaranty of a jury trial set forth in Article I, §13 of the Illinois Constitution (1970).

By depriving Landers its Illinois Constitutional right to a jury trial as herein described, the Appellate Court also deprived Landers the right to have the jury verdict in favor of the bank be reconsidered in light of Landers' affirmative defense of waiver to the bank's claim, the two verdicts being necessarily inconsistent. The general rule is that "a verdict is bad and will not support a judgment where it is inconsistent, contradictory, repugnant, or illogical, CJS Trial §496; *Moore v. Jewel Tea Co.*, 46 Ill.2d 288, 263 N.E.2d 103 (1970); *Martin v. McCarry,* 2 Ill.App.3d 650, 275 N.E.2d 97 (4th Dist. 1971); *Manders v. Pulice,* 44 Ill.2d 511, 256 N.E.2d 330 (1970); *Western Springs Park District v. Lawrence,* 343 Ill. 302, 175 N.E. 579 (1931); *Marotta v. General Motors Corp.*, 108 Ill.2d 168 (1985); *Pease v. Ace Hardware Home Center,* 147 Ill.App.3d 546, 559 (2d Dist. 1980).

The First District's opinion in *Stewart v. Huff,* 14 Ill.App.3d 782, 303 N.E.2d 641 (1st Dist. 1973) stands virtually on all fours with the instant case in terms of the inconsistency between a defendant and counterplaintiff's verdict on his counterclaim which rested on the same factual and legal theory as said defendant and counterplaintiff's affirmative defense to the plaintiff and counterdefendant's suit on a note.

At oral argument, the Appellate Court seemed to recognize that to the extent the bank admitted that there was sufficient evidence adduced at trial from which the jury could have concluded that a contract existed, it followed that the verdict in favor of the bank on the promissory note was indeed inconsistent with the verdict in favor of Landers on its breach of contract claim. That is true because Landers' affirmative defense of waiver to the bank's suit on the note was the same as its

counterclaim for breach of contract, with the exception that the latter included the element of consideration which the former did not.

Thus, Landers proved more to establish a breach of contract than it had to prove in order to establish waiver. Therefore, the result in this case should have been the ordering of a new trial. That is, of course, unless the Court stood to be persuaded that the evidence as a matter of law supported the entry of judgment for Landers on its affirmative defense of waiver, which it does. In that case, of course, the Court should have entered judgment NOV for Landers.

VI.

This Court's Decision Reversing The Judgment In Favor Of Landers And Affirming The Judgment In Favor Of The Bank Under Circumstances Where This Court Had No Constitutional Or Statutory Authority To Reverse The Judgment In Landers' Favor On The Bases That It Did, Deprived Landers Of Its Right To Trial By Jury Guaranteed By The Ill. Constitution (1970) Article I §13 And Thereby Denied Landers Its Property Right Created By Illinois Law Not To Be Deprived Of A Jury Trial Without Due Process Of Law, Guaranteed By The Fourteenth Amendment To The United States Constitution.

The Fourteenth Amendment to the United States Constitution provides in relevant part that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law . . . ." Property rights in turn "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Board of Regents v. Roth,* 408 U.S. 564, 576-578 (1972). See also *Cleveland Board of Education v. Loudermil! et al,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). As demonstrated in the preceding sec-

tion, the Illinois Constitution of 1970, Article I, §13 creates and the case law construing it defines the right to a trial by jury which a litigant before the courts of the State of Illinois such as Landers Seed Company possesses. Under *Board of Regents v. Roth* and its progeny, therefore, Landers had a State of Illinois created property right to trial by jury protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

In this regard, "the due process clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Board of Education v. Loudermill et al,* 84 L.Ed.2d at 503. "The right of due process is conferred, not by legislative grace, but by (federal) constitutional guarantee." *Id.* "Once it is determined that the due process clause applies, the question remains what process is due." *Morrisey v. Brewer,* 408 U.S. 471, 481 (1972). See also *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 432, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982). It has long been held that the essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 94 L.Ed. 865, 70 S.Ct. 652 (1950).

In the instant case, as has hereinabove been demonstrated, this Court adjudicated issues as to the sufficiency of the evidence to support the existence of a contract and the sufficiency of the evidence in support of the jury verdict finding that the Plaintiff bank breached the contract it had necessarily found to exist. In so doing, this Court adjudicated issues which had never been ruled upon by the trial court and, therefore, exceeded its appellate jurisdiction. Additionally, in so doing, this Court exceeded its scope of review under *Ill. Rev. Stat.* Chapter 110A §366(b)(2)(iii).

Consequently, this Court has necessarily adjudicated issues which had never before been brought to the attention of

Landers in that they had never been raised in the trial court, never presented in the post-trial motion and not briefed on appeal in this court whereby Landers could have responded. Therefore, Landers had no notice and no opportunity to be heard on the questions as to whether or not the evidence was sufficient to show the existence of a contract. Landers had no notice or opportunity to be heard on whether or not the evidence was sufficient to sustain the jury verdict in favor of Landers that the bank breached the contract which the jury necessarily found to have existed.

Had there been compliance with the provisions of *Ill.Rev.Stat.* Chapter 110 §1202(b) and *Ill. Rev. Stat.* Chapter 110A §366(b)(2)(iii), respecting issues going to the sufficiency of the evidence to support the existence of a contract and the sufficiency of the jury verdict finding that the bank breached the contract, Landers, of course, would have had notice and an opportunity to respond. Moreover, even failing compliance with §2-1202(b) and Supreme Court Rule 366(b)(2)(iii), had the issues of the sufficiency of the evidence going to the existence of the contract and to the jury verdict finding a breach of that contract by the bank been briefed by the bank in this Court, Landers probably would have had, for federal due process purposes, adequate notice and an opportunity to be heard. However, in availing itself of that opportunity to be heard, Landers undoubtedly would have taken the position that those issues were not properly before the court as having not been preserved under state law.

In any event, based on what the record in this case shows without equivocation, Landers had no notice at any point in the proceedings herein prior to this Court's announcement of its decision on January 21, 1988 that their existed any question as to the sufficiency of the evidence as to the existence of a contract between it and the bank. Moreover, at no point in the proceedings herein, prior to this Court's announcement of its decision on January 21, 1988 did Landers have any notice that the

sufficiency of the evidence that it put forth to sustain the jury verdict that the bank had breached that contract was in question. By not having any notice of either of the foregoing, Landers obviously had no opportunity to respond and attempt to rebut the arguments which this Court sua sponte made in its January 21, 1988 opinion.

In taking Landers' jury verdict away from it without having the constitutional jurisdiction to do so and further in violation of the Supreme Court Rules, this Court thereby deprived Landers of the property right to trial by jury created by Illinois Constitution (1970) Article I, §13. Moreover, this Court deprived Landers the right to have that verdict in its favor viewed in light of the contrary verdict in favor of the bank on its complaint on the promissory note. Those verdicts are necessarily inconsistent thereby entitling the parties to a new trial. See *Stewart v. Huff, supra.*

Therefore, Landers' federally protected property right created by Illinois law to trial by jury has been denied Landers by this Court without any notice and without an opportunity to be heard on the issue. Landers has therefore been denied its property right created by Illinois law to trial by jury without any process, let alone due process of law as contemplated by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the reasons above stated, Landers prays this Court to rehear the above captioned matter and pursuant thereto, vacate its decision and opinion of January 21, 1988 and either enter judgment in Landers' favor or order a new trial.

Respectfully submitted,

Law Offices of John H. Bisbee
Attorneys for Defendant-Appellant-
Cross-Appellee
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

By: /s/ John H. Bisbee

Dated: March 2, 1988

CERTIFICATE OF MAILING

I hereby certify that I have on this 2nd day of March, 1988, deposited three true and correct copies of the foregoing PETITION FOR REHEARING in the United States mails, postage prepaid to Mr. James Evans, Evans & Froehlich, 44 Main Street, P.O. Box 737, Champaign, IL 61820.

/s/ John H. Bisbee

APPENDIX U

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
Supreme Court Building
Springfield, 62701-1792

Date: 03-16-88

RE: Champaign National Bank v. Landers Seed Co., et al
General No.: 4-87-0460
Moultrie 84L4

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this Court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368(b)) is filed in this court.

Darrly Pratscher, Clerk
Appellate Court
Fourth District

D P : m o b

TO: John H. Bisbee
Law Offices of John H. Bisbee
437 N. Lafayette Street
Macomb, Illinois 61455

James W. Evans, Ltd.
Evans & Froehlich
44 Main St., P.O. Box 737
Champaign, IL 61820

APPENDIX V

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

The Champaign National Bank,
a National Banking Association,
Plaintiff-Respondent,

v.

Landers Seed Co., Inc.
Defendant-Petitioner.

Appeal from the Appellate Court for the
Fourth Judicial District
Case No. 4-87-0460

Appeal from the Circuit Court of the
Sixth Judicial Circuit,
Moultrie County
Case No. 84-L-4

Honorable W.B. Kranz
Judge Presiding

PETITION FOR APPEAL AS A MATTER OF RIGHT;
IN THE ALTERNATIVE PETITION FOR
LEAVE TO APPEAL

PRAYER FOR RELIEF

Petitioner, hereafter referred to as "Landers" or "Landers Seed Co." hereby prays this court to enter an order permitting it to appeal as a matter of right from the Judgment of the Illinois Appellate Court for the Fourth Judicial District for the reasons which hereinafter appear. Alternatively, Petitioner prays this court to enter an order granting it leave to appeal from the Judgment of the Illinois Appellate Court for the Fourth Judicial District for the reasons hereafter appear.

II

STATEMENT OF JUDGMENT BELOW

The Illinois Appellate Court for the Fourth Judicial District entered judgment on January 21, 1988, and on that date filed its opinion, a copy of which is attached hereto as Appendix "A". That Judgment affirmed that part of the Champaign National Bank hereafter "bank", and against Landers on the bank's complaint on a promissory note in the amount of $724,637.37. However, the Appellate Court's judgment reversed that part of the judgment of the circuit court entered on the jury verdict in favor of Landers and against the bank on Landers' counterclaim for breach of contract in the amount of $60,833.31. In so reversing the judgment in the latter respect, the Appellate Court found there was "insufficient evidence of contract" and that the verdict "was against the manifest weight of the evidence". The Judgment of the circuit court dated June 30, 1987, is attached hereto as Appendix "B".

Petitioner filed its petition for rehearing in the Appellate Court on March 2, 1988. On March 16, 1988, the Appellate Court entered an Order denying that Petition, a copy of which Order is attached hereto as Appendix "C". On March 17, 1988, Petitioner filed an affidavit of intent to seek review in this Court, a copy of which is attached hereto as Appendix "D".

III

POINTS RELIED UPON FOR REVERSAL OF THE JUDGMENT OF THE APPELLATE COURT

A. Appeal as of Right

1. The Appellate Court Had No Authority Under the Illinois Constitution (1970) Article VI §6 To Conclude (i) There Was "Insufficient Evidence Of Contract" and (ii) The Jury Verdict In Favor Of Landers On Its Contract Claim "Was Against The Manifest Weight

Of The Evidence" As Those Issues Were Not Raised At Any Time In The Circuit Court, Including In The Bank's Post-Trial Motion; Were Not Ruled Upon By The Circuit Court, And Were Not Briefed Or Argued On Appeal.

2. The Appellate Court's Opinion Concluding (i) "Insufficient Evidence of Contract" and Entering Judgment NOV On That Basis and (ii) That The Jury Verdict In Favor Of Landers "Was Against Manifest Of The Weight Of The Evidence" Deprived Landers Of Its Right To A Jury Trial Guaranteed Inviolate By The Illinois Constitution (1970) Article 1 §13 And Thereby Deprived Landers Of The Necessarily Inconsistent Verdict Relative To The Verdict In Favor Of The Bank On The Promissory Note, Which Inconsistency Required A New Trial.

3. The Appellate Court's Decision Reversing The Judgment In Favor Of Landers On the Grounds "Insufficient Evidence Of Contract" and The Verdict Being "Against The Manifest Weight Of The Evidence" When Those Grounds Had Not Been Advanced In The Circuit Court, Had Not Been Briefed Or Argued On Appeal, Deprived Landers Of Due Process Of Law Guaranteed By the Fourteenth Amendment To The United States Constitution and The Illinois Constitution (1970) Article 1 §2.

B. Appeal as a Matter of Sound Judicial Discretion

1. The Appellate Court Had No Authority Under Supreme Court Rule 366(B)(2)(iii) To Conclude (i) There Was "Insufficient Evidence Of Contract" and (ii) The Jury Verdict In Favor Of Landers On Its Breach Of Contract Claim "Was Against The Manifest Weight Of The Evidence" As Those Issues Were Not Raised At Any Time In The Circuit Court

Including In The Bank's Post-Trial Motion, Were Not Ruled Upon By The Circuit Court, and Were Not Briefed Or Argued On Appeal; This Case Raises An Important Question Respecting The Integrity Of The Appellate Decision Making Process Requiring The Exercise By This Court Of Its Supervisory Authority.

2. Even If The Appellate Court Had The Authority To Conclude The Verdict In Favor Of Landers Was "Against The Manifest Weight Of The Evidence," Which It Did Not, The Remedy Was To Order A New Trial, Not To Enter Judgment NOV.

3. The Appellate Court's Conclusions Of "Insufficient Evidence Of Contract" and the Jury Verdict For Landers Being "Against The Manifest Weight Of The Evidence" Conflict With This Court's Opinions In *Steinberg v. Chicago Medical School*, 69 Ill.2d 320 (1977) and *Midland Hotel v. R.H. Donnelley Corp.*, 118 Ill.2d 306 (1987), Thereby Requiring The Exercise Of This Court's Supervisory Authority To Reconcile That Conflict.

IV

STATEMENT OF FACTS AND PROCEEDINGS

A. Relevant Facts

Landers Seed Company was founded in the late 1930s by Glen Landers. T-226, 227, 20.[1] Glen Landers and his wife Maxine worked in the business until the middle 1970's. Beginning in the middle 1970's, their son Charles assumed a major role in the family business. T-59, 115-118. By December, 1980 Charles Landers was essentially in charge of the company. T-115-118.

---

[1] References in the Statement of the Case and Statement of the Relevant Facts are derived from the Common Law Record and the Transcript of the Proceedings. References are to the letter "C" or "T" plus the page number from the Common Law Record or the Reporter's Transcript as the case may be.

From its founding in the late 1930's until August 23, 1982 Landers conducted all of its banking business with the First National Bank of Sullivan. T-20, 22, 23. Landers had never been in default respecting any of its business with Sullivan and Sullivan had never had any problem with the Landers account. T-26. Moreover, the First National Bank of Sullivan had never had any problem with the reliability of Glen Landers, Maxine Landers or Charles Landers. T-26. During the course of its banking relationship with Landers, the First National Bank of Sullivan never required security other than the personal guarantees of Glen and Maxine Landers. T-41. The lending went as high as $1.7 million dollars without security. T-41.

Over the years, First National Bank would "participate" loans in excess of its lending limits to other banks, including the Champaign National Bank. T-22. Sullivan's lending limit for the relevant period in this case was approximately $300,000. T-21, 22. With respect to the Landers Seed Company, the First National Bank of Sullivan's participation relationship with the Champaign National Bank began in the early 1970's. T-22. That relationship was developed between Jan Haegen, an officer of the First National Bank of Sullivan and one Lee O'Neill, an officer of the Champaign National Bank. T-22-24.

The participations were evidenced by participation agreements. T-24. Under the participation arrangement developed between the First National Bank of Sullivan and the Champaign National Bank respecting the Landers account, the Champaign National Bank had no right of collection directly against Landers. T-25, 26, 422, 423. Rather, any action that needed to be taken against the customer had to be taken by the bank which had initiated the participation, in this case the First National Bank of Sullivan. T-26, 421-423.

In April, 1982, Landers contacted Jan Haegen at the First National Bank of Sullivan to advise Haegen that there was going to be an operating loss for Landers' fiscal year ending June 30,

1982. T-62. Landers advised Lee O'Neill of the fact of the impending loss as well. T-62. Additionally, Charles Landers indicated that Landers Seed Company was going to need to borrow an additional $700,000 in April, 1982, $200,000 of it to come from the Champaign National Bank as part of the participation. T-345-347 and 427-429. O'Neill appreciated getting the information from Charles Landers that Landers anticipated a loss for the fiscal year ending June 30, 1982. T-427, 428. However, Charles Landers had indicated the loss would only be in the neighborhood of $100,000. T-347-348. The bank agreed to fund the additional loan request. T-429. By funding that request in April, 1982, Landers' borrowing from First National Bank of Sullivan and Champaign National Bank totaled $1,700,000. Defendant's Exhibit 13, Page 2.

In the early part of August, 1982, Champaign National Bank received a "compilation report" for the end of fiscal year 1983 which ended June 30, 1982. T-230, 231, 431, 432. That report, a comprehensive report on the company's financial condition, had been prepared by Nick Piraino, the certified public accountant who had done Landers Seed Company's work for 25 years. T-230, 232. The actual loss suffered by the company for the fiscal year ending June 30, 1982 was $378,551. T-238-239. Additionally, the bank learned in or about early August, 1982 that the $378,551 loss would probably have been greater had the company adhered to generally accepted accounting principles in valuing its inventory at the lower of cost or market. T-243-44, 305, 354. Instead, Charles Landers had valued the company's inventory at his cost which served to minimize the loss. *Id.*

Being concerned, in light of that loss, that the only rights it had were directly against the First National Bank of Sullivan, Champaign, through its officers Lee O'Neill and one Steve Vandenberg, scheduled a meeting for August 23, 1982 with the Landers and the First National Bank of Sullivan. T-364, 365, 421, 422, 431-436. The purpose of that meeting was to alter the relationship that Champaign National Bank had had up to that

time with Landers by making it a direct relationship and eliminating the participation arrangement that had existed between Sullivan and Champaign. T-364, 365, 421-423, 432-435.

The meeting was held at the First National Bank of Sullivan on August 23, 1982. Present were officials of the Sullivan Bank, the Champaign Bank and the Landers family. T-13, 14, 15-18, 66-67, 436, 437, 505-515. The bank, in addition to Lee O'Neill, was represented by its attorney Arthur Mann. T-66-67, 505-526. Glen and Maxine Landers brought two attorneys, Vernon Elder and Robert Elder, to represent their individual interests. T-66-67, 505-526. Landers Seed Company was not represented by counsel. T-505-526, 67. The meeting was called to order by Lee O'Neill of the Champaign National Bank and he "took control" of the meeting. T-436, 67. After O'Neill "took control" of the meeting, he indicated that "the previous relationship in the form of the participations being purchased (from Sullivan) was no longer acceptable to Champaign National Bank and it was necessary for (Champaign) . . . to develop a direct loan relationship with the Landers corporation". T-365. O'Neill further indicated that he wanted the indebtedness collateralized. T-365. O'Neill did not recall how long his introductory remarks along those lines took. T-367. However, he did recall that there was discussion and that the meeting took at least an hour. T-367.

Before any documents were signed, the question was put to O'Neill as to whether or not he intended to put Landers Seed Company out of business. T-71, 439, 440. In response to that, O'Neill said in the presence of all the Landers that he wanted "to work with the seed company". T-72, 438, 439. O'Neill said that the Champaign Bank was will to work with Landers so as to get Landers back to "profitability" or to get a reasonable chace for "profitability". T-71, 439, 440. Charles Landers testified that O'Neill indicated that the seed company's attaining profitability could take up to three years. T-71, 154, 327. O'Neill's tone toward Landers Seed Company was a positive one on

August 23, 1982. T-327. O'Neill showed confidence in Charles Landers. T-327.

To a banker, the language "working with a customer" often means the "rolling over" of various promissory notes. T-326. To O'Neill, as conveyed to Charles Landers, "rolling over" meant that the various notes would be paid by renewal. T-72. "Rolling over" also meant to O'Neill that the notes would be paid by renewal assuming the interest was paid. T-438-443.

After O'Neill made the statements evidencing a willingness to "work with" Landers Seed Company, Charles Landers and his parents being the principals of Landers Seed Company signed the various documents. T-72-73, 438-440, 316, 325-326. Those documents included a document entitled "Loan Agreement". T-435; Landers' Exhibit 1. That agreement described the new relationship among Champaign, First National Bank of Sullivan and Landers Seed Company. T-435, 446. The documents also included a promissory note dated August 23, 1982 payable to the order of Champaign National Bank in the principal amount of $1,281,000.00. Landers' Exhibit No. 2. Also, included was a mortgage executed by Glen and Maxine Landers in favor of Champaign National Bank. Landers' Exhibit No. 3. The documents also included a security agreement in favor of Champaign National Bank executed by Landers Seed Company. Landers' Exhibit No. 4. Also signed on August 23, 1982 was the guaranty executed by Charles Landers, Glen Landers, Maxine Landers and Charles' wife, Lorelyn Landers. Landers' Exhibit No. 5.

As a condition of "working with" Landers Seed Company, O'Neill required that Landers pay interest on the various promissory notes as they became due. T-442, 443. He required that there be a reduction in the principal balance. T-443-445. However, he did not prescribe a schedule for the reduction of the principal balance. T-443-445. Additionally, the bank, through O'Neill, required that Landers report to the bank on a monthly basis respecting projections, profit and loss statements and things of that sort. T-440.

Landers always complied with the reporting requirements. T-441. It paid the interest on the note which was signed August 23, 1982 and that note was paid by renewal on December 21, 1982 pursuant to the understanding of the parties. T-443. Landers also made payments sufficient to cover the interest on the note signed December 21, 1982, the note on which the bank filed the instant lawsuit. T-464-466. Additionally, Landers reduced principal in four separate payments of $260,300.97 on March 31, 1983, Exhibit 6; $98,000 on April 22, 1983, Exhibit 7; $16,000 on June 28, 1983, Exhibit 8; and $144,777 on September 15, 1983, Exhibit 9 respectively. T-18, 217 through 225, 463 through 465, Landers' Exhibits 6, 7, 8, and 9. T-217-224, 462-466.

In January of 1983, during one of the meetings between Charles Landers and Lee O'Neill, Landers advised the Bank that the financial situation was not bright for fiscal year 1983 which had begun July 1, 1982 and was to end June 30, 1983. T-450. This was in part because of the PIK program which had been instituted the Fall of 1982 and because of the agricultural economy which by that time had become generally very depressed. T-447 through 450. In response to this information, the bank advised Landers that he ought to sell the company. T-451. By March, 1983, Charles Landers advised O'Neill that the anticipated losses were going to be even more significant than he had thought in January of 1983. T-451. The bank became more concerned and was desirous that Landers find a buyer. T-451-452. Additionally, O'Neill suggested that Glen and Maxine Landers pledge additional of their collateral to the bank to secure the debt. T-402, 403. By May, 1983, the bank learned that Landers was not having a good sales year. T-453. However, the bank also learned that pursuant to its own suggestions, Landers had pared down its sales staff. T-461. The bank was aware, in this respect, that there was a correlation between a reduction of the sales staff and a reduction in sales. T-461.

A meeting was scheduled for July 1, 1983 at which time Charles Landers anticipated he would be obliged to present pro-

jections for the oncoming fiscal year which began July 1, 1983 for purposes of showing the company's progress toward profitability. T-77-86; Landers Exhibit 10. Present at the meeting in addition to O'Neill and Landers were the company CPA, Nick Piraino, and Jan Haegen of the First National Bank of Sullivan. T-81. Charles Landers prepared and submitted a projection which showed two possible scenarios, the first being a net operating profit of $800, T-81-86, 456, and the second a $73,000 loss. T-81-86, 456, 457. O'Neill acknowledged that even the $73,000 loss was an improvement over the $378,551 loss for the fiscal year ending June 30, 1982. T-456, 457. The evidence offered by the CPA, Piraino, was that the budget proposal for the fiscal year beginning July 1, 1984 was reasonable. T-252. Had it not been reasonable, Piraino would have advised Charles Landers and the bank people on July 1, 1983. T-253, 266.

However, when the bank representatives went to the meeting on July 1, 1983, they had no intention of working further with Landers. T-454-456. Accordingly, O'Neill was not interested in Landers' projection for the fiscal year beginning July 1, 1983. T-84, 454, 455. The bank representatives did not inquire of Piraino, the CPA as to the reasonableness of the budget projections or otherwise question him. T-458.[2] The bank advised Landers that it wanted him to liquidate the company. T-85. Prior to July 1, 1983, the bank had never demanded payment or otherwise indicated payment was due respecting the December

---

[2] The compilation report prepared by Nick Piraino, the Company CPA for the fiscal year ending June 30, 1983 was not mailed until late August, 1983. T-241. That report showed a loss of $854,492. However, that was the loss for the fiscal year which was underway when the August 23, 1982 agreement was entered into. The bank was aware that a large portion of the losss for the year ending June 30, 1983 was a loss from reevaluation of inventory. T-243-44. The bank was further aware in August, 1982 that Charles Landers had valued the inventory for fiscal year ending June 30, 1982 at his cost and not the lower of market or cost. T-305.

21, 1982 note. T-89. It had never suggested to Landers that Landers was in default or had otherwise failed to live up to the agreement of August 23, 1982. T-89-93, 441, 442, 443, 463-466.

After the bank's liquidation order of July 1, 1983, Landers Seed Company became defunct. T-255. To reestablish a customer base would have taken between three to five years. T-228. The cost of maintaining a customer base for sales of $800,000, the sum projected for the fiscal year beginning July 1, 1984, would have been between $50,000 and $60,000 per year. T-257-258.

B. Relevant Proceedings:

On January 16, 1984 the bank filed a complaint and confession of judgment on the promissory note dated December 21, 1982 against Landers. The Complaint and Confession of Judgment also named Glen Landers, Maxine Landers, Charles Landers, and Lorelyn Landers all individually as parties defendant on a guaranty those individuals had signed respecting the note. C-1-5. Landers Seed Company filed a motion to open the judgment by confession and for leave to file and answer and counterclaim.[3] C-120-144. On July 6, 1984, the court entered an order opening the confession judgment against Landers and granting it leave to file its answer and counterclaim. C-229-235.

Landers' Answer set forth three affirmative defenses alleging waiver, estoppel and modification of contract. C-123-130. Lander's Counterclaim alleged breach of contract, fraud, and willful and wanton misconduct. C-130 through 137. Landers'

---

[3] The individually named Defendants filed motions to vacate the confession judgment against them which motions were ultimately granted. The individually named Defendants also filed answers and in the case of Glen and Maxine Landers, a counterclaim. The bank's action on the promissory note against the Seed Company was separated for purposes of trial from its action on the guaranty against the individually named Defendant.

third affirmative defense as originally pleaded and Count III of its counterclaim as originally pleaded were amended on January 12, 1987 to allege bad faith dealing on the part of the bank. C-535-547.

At the close of all the evidence, the bank orally moved for a directed verdict "in connection with the counterclaim of Landers Seed Company, Inc." T-562. The bank also filed a written motion at the close of all the evidence for a directed verdict on Landers' counterclaim on the grounds that "the evidence and Exhibits offered by (Landers) wholly failed to establish the existence of any damages to (Landers) which was proximately caused by the alleged breach of contract on the part of the (bank)." C-563, 564. The circuit court denied those motions. C-562, T-562.

Pursuant to Landers' first affirmative defense of waiver, the jury was instructed that Landers was not liable to the bank on the promissory note claim if the jury found that the bank by its officers and agents

> "(1) knowingly by agreement, declaration or course of conduct; (2) expressed an intention to delay enforcing its rights under the promissory notes under certain conditions; (3) in so doing, knowingly and voluntarily agreed to delay enforcing its rights under the promissory notes under certain conditions."

C-618; Reporter's Transcript 591-600. The court instructed the jury respecting Count I of Landers' counterclaim alleging breach of oral contract that in order for Landers to recover it had the burden of proving each of the following propositions:

> First that Champaign National Bank agreed to work with Landers Seed Co. and delay enforcing its rights under the promissory note so long as Landers Seed Company was making reasonable progress toward profitability or so long as there was a chance that Landers Seed Company would

attain profitability and so long as Landers Seed Co. paid interest on the notes as they became due, a period which could take up to three years.

Second that Landers Seed Company paid consideration for this agreement by executing the notes of August 23, 1982 and December 21, 1982 directly payable to Champaign National Bank, executed a security agreement in favor of Champaign National Bank, caused Glen and Maxine Landers to execute a mortgage in favor of Champaign National Bank to property that Glen and Maxine Landers owned, cause Glen Landers, Charles Landers, maxine Landers, and Lorelyn Landers to execute personal guarantees in favor of Champaign National Bank, paid interest on the August 23, 1982 note and the December 21, 1982 note as they became due, and made reasonable progress toward profitability.

Third that Champaign National Bank nonetheless caused the liquidation of Landers Seed Co. on or about July 5, 1983 notwithstanding its agreement to work with Landers Seed Co. and

Fourth that Landers Seed Company was damaged as a result of the Bank's actions.

Over Landers' objection, the trial court instructed the jury that it could return a verdict for both the bank on its claim on the promissory note and for Landers on any one of its counterclaims. C-626-630, 641; T-602-610.

On January 23, 1987, the jury returned a verdict in the amount of $724,637.37 for the bank on its complaint on the promissory note. C-647-650. The jury also returned a verdict in favor of Landers Seed Company and against the bank on Count I of Landers' counterclaim for breach of contract in the amount of $60,833.31. C-647-650.

the bank filed a post-trial motion and amended post-trial motion for judgment notwithstanding the verdict as to Count I of

Landers' counterclaim. C-651-655; C-681-685. The bank's post-trial motions are appended hereto as Appendix "E". Landers filed a post-trial motion seeking amendment of the verdict, judgment notwithstanding the verdict, and a new trial. C-660-667.

The bank's post-trial motions seeking judgment notwithstanding the verdict did not allege that the evidence was insufficient as a matter of law to establish a contract. C-652-53, 682-85. The bank's post-trial motions did not allege that the verdict of the jury in favor of Landers was against the manifest weight of the evidence. C-652-653, 682-685.

Rather, the positions taken by the bank in its post-trail morions were: (i) that the parol evidence rule precluded the introduction into evidence of the oral agreement alleged by Landers whereby the bank agreed to delay enforcing its rights under the promissory notes in consideration of Landers' agreement to execute those documents creating a direct relationship between it and the bank. C-652-653, 682-683; (ii) that Landers' evidence in support of its damages was legally insufficient by reason of being "remote, speculative, and not reasonably related to restoring (Landers) to the position it would have had if the alleged oral contract had been fully performed by the bank," C-652-53, 683-84; (iii) that Landers "failed to produce any evidence indicating that the damages substained by (Landers) were reasonably foreseeable by the bank or that the actual failure of (Landers') business was proximately caused by the bank's breach of the alleged oral agreement," C-653-683; and (iv) that the circuit court erred in granting Landers' instruction #23 permitting the jury to consider various items of damage, C-684-85.

The circuit court's ruling on the bank's post-trial motion addressed itself to the applicability of parol evidence rule and denied the bank's motion in that respect. C-708. Also, the circuit court addressed and denied the bank's post-trial motion

respecting damages, indicating that the damage verdict on the counterclaim in Landers favor was "within the range of the evidence presented." C-708. The Circuit Court's memorandum ruling on the post-trial motions is appended hereto as Appendix "F".

In the Appellate court, the bank argued in accordance with its post-trial motion. In subsection A of the argument portion of its brief beginning at page 13, the bank argued that "the trial erred by permitting the jury to hear certain testimony in violation of the Rule prohibiting parol evidence." In the argument under heading B on page 19 of its brief, the bank argued that "the trial court erred in not vacating the verdict of the jury as to count one of the counterclaim due to the insufficiency of the evidence in establishing that the bank's breach of contract caused the failure of Landers Seed Company, Inc." The bank's argument under heading C of its brief at page 20 was that "the trial court erred in giving defendant instruction #23 which allowed the jury to consider inappropriate items of contract damages." The bank's last argument in its brief was that "the trial court did not err in denying the post-trial motions of Landers Seed Company, Inc.", appearing at page 21 of its brief.

The body of the bank's arguments under the foregoing headings was in accordance with those headings. Brief of Champaign National Bank in Appellate Court, pages 13-23. At oral argument, the bank admitted that there was sufficient evidence to support the jury finding that there was a contract. Appellate Court opinion page 5. The entirety of the bank's brief in the Appellate court is appended hereto as Appendix "G".

V.

ARGUMENT

A. APPEAL AS OF RIGHT

1. The Appellate Court Had No Authority Under The Illinois Constitution (1970) Article VI §6 To Conclude (i) There Was Insufficient Evidence Of Contract'' and (ii) The Jury Verdict In Favor Of Landers On Its Contract Claim ''Was Against The Manifest Weight Of The Evidence'' As Those Issues Were Not Raised At Any Time In The Circuit Court, Including In The Bank's Post-Trial Motion; Were Not Ruled Upon By The Circuit Court, And Were Not Briefed Or Argued On Appeal.

Under the Illinois Constitution (1970), Article VI §6,[4] the jurisdiction of the Appellate Court is essentially appellate jurisdiction. that means, according to this Court in *Sprague v. Goodrich*, 376 Ill. 80, 32 N.E.2d 897 (1941), construing the predecessor to Article VI, §6 of the 1970 Illinois constitution, that the jurisdiction of the appellate court is limited as follows:

> The office of the appellate court is to review rulings, orders or judgments of the court below, contained in the record,

---

[4] Article VI §6 Ill. Constitution (1970) Provides:
Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal. The Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts. The Appellate Court may exercise original jurisdiction when necessary to the complete determination of any case on review. The Appellate Court shall have such powers of direct review administration action as provided by law, unless the lower court's failure to rule is made the subject of an assignment of error, in which case the propriety of such failure is the question presented to the appellate court and not the merits of the matter upon which the trial court refuses to act.

> and matters not ruled upon by the inferior court are not subject to the consideration of the appellate court.

32 N.E.2d at 897. This Court in *Sprague v. Goodrich, supra* went on to say that "in other words, the appellate court's jurisdiction is appellate, and *extends only to those matters in controversy which have been ruled upon by the trial court.*" [Emphasis supplied]. *Id.*

To the same effect are the appellate court opinions in *Board of Education of Chicago Teachers Union*, 26 Ill.App.3d 806 (1st Dist. 1975) and *Edelman v. Lee Optical Co.*, 24 Ill.App.3d 216 (1st Dist. 1974). Both those decisions construed present Article VI, §6 of the Illinois Constitution (1970). In *Chicago Teachers Union, supra*, the court said:

> our function as an appellate court is to review the rulings, orders, or judgments of the court below, those contained on the record. Issues which the trial court has refused to decide will not be considered by us unless we are asked to decide whether the refusal was an abuse of judicial discretion. In such case, we should not have before us the merits, if any, of the issues on which the trial court refused to act. Our jurisdiction is, in the first instance, appellate; it extends only to those matters in controversy which have been passed upon by the trial court (citing *Sprague v. Goodrich, supra*). Jurisdiction cannot be conferred upon us by the parties or by failure of any one of them to call to our attention a jurisdictional defect (citing *In Re Organization of the Fox Valley community Airport Authority*, 23 Ill.App.3d 168, 318 N.E.2d 496).

26 Ill.App.3d at 813.

The predecessor to Article VI, §6 of the Constitution of 1970, Article VI, §7 of the constitution of 1870 which was construed by the *Sprague v. Goodrich, supra*, court did not contain any provision for the exercise by the appellate court of original jurisdiction. Effective January 1, 1962, however, the 1870 Con-

stitution was amended to provide for the exercise by the appellate court of "such original jurisdiction as may be necessary to the complete determination of any cause on review." SHA Constitution (1870) Article VI §7. See *Franks v. North Shore Farms Inc.*, 115 Ill.App.2d 57, 73-74, (1st Dist. 1969). However, that provision is generally restricted to permitting an appellate court to pass upon post-trial motions actually filed in the circuit court but not, for whatever reason, acted upon by the circuit court. See *Franks v. North Shore Farms Inc.*, 115 Ill.App.2d 57, 73-74 (1st Dist. 1969). Moreover, as the Appellate Court observed in *People v. Love*, 6 Ill.App.3d 572, (1972) it had no authority to "consider matters not properly before (the appellate) court on appeal and matters never presented or considered for any purpose by the trial court . . . (are not properly before the appellate court)." *Id.* at 582.

The record in this case is clear that there was no motion filed by the bank at pleading stage in the circuit court attacking the legal sufficiency of Count I of Landers' Counterclaim alleging breach of contract. The circuit court, therefore, had no opportunity to address that issue. At the close of the evidence, the record does indicate that the bank orally moved for a directed verdict "inconnection with the Counterclaim of Landers Seed Co., Inc." Transcript 562. Also, the bank filed a written motion at the close of all the evidence for a directed verdict on Landers' Counterclaim on the grounds that "the evidence and exhibits offered by (Landers) wholly failed to establish the existence of any damages to (Landers) which was proximately caused by the alleged breach of contract on the part of the (bank)." C-563, 564. The court denied those motions. C-562, T-562.

But the record is clear that as is required by *Ill. Rev. Stat.* Chapter 110 §1202(a), no post-trial motion was filed by the bank seeking judgment notwithstanding the verdict in the circuit court under the standard of *Pedrick v. Peoria and Eastern RR Co.*, 37 Ill.2d 494 (1967), or any standard for the reason that

the evidence was insufficient as a matter of law to establish a contract. C-652-53, 682-85. The Bank did not file a motion for a new trial on the ground that the verdict of the jury in favor of Landers was against the manifest weight of the evidence as required by *Ill. Rev. Stat.* Chapter 110 §2-1202(b). C-652-653, 682-85.

Rather, the only positions taken by the bank in its post-trial motion were (i) that the parol evidence rule precluded the introduction into evidence of the oral agreement alleged by Landers whereby the bank agreed to delay enforcing its rights under the promissory notes in consideration of Landers' agreement to execute those documents creating a direct relationship between it and the bank, C-652-653, 682-83; (ii) that Landers' evidence in support of its damages was legally insufficient by reason of being "remote, speculative, and not reasonably related to restoring (Landers) to the position it would have had if the alleged oral contract had been fully performed by the bank," C-652-53, 683-84; (iii) that Landers "failed to produce any evidence indicating that the damages sustained by (Landers) were reasonably foreseeable by the bank or that the actual failure of (Landers') business was proximately caused by the bank's breach of the alleged oral agreement," C-653, 683; and (iv) that the circuit court erred in giving Landers' Instruction No.23 permitting the jury to consider various items of damage, C-684-85.

The circuit court's ruling on the bank's post-trial motion addressed itself to the applicability of the parol evidence rule and denied the bank's motion in that respect. C-708. Also, the circuit court addressed and denied the bank's post-trial motion respecting damages, indicating that the damage verdict on the counterclaim in Landers' favor was "within the range of the evidence presented." C-708. Nothing else was ruled upon by the circuit court. No other issues were preserved by the bank.

By reason of the issue of the sufficiency of the evidence of contract not having been preserved and ruled upon by the cir-

cuit court at the post-trial motion stage, that issue was not before the Appellate Court by force of Ill. Const. (1970) Article VI §6. *Sprague v. Goodrich, supra; Board of Education of Chicago v. chicago Teachers Union, supra; Edelman v. Lee Optical Co., supra.* Moreover, as the Appellate Court acknowledged in its opinion, the bank by competent and experienced counsel, admitted that there was sufficient evidence to support the jury verdict finding that there was a contract.[5] Opinion Page 5. The Appellate Court's conclusions, therefore, that there was insufficient evidence of contract and that the verdict for Landers was against the manifest weight of the evidence are void as being an attempted exercise of original jurisdiction. Ill. Const. (1970) Article VI, §6; *Sprague v. Goodrich, supra; Board of Education of Chicago v. Chicago Teachers Union, supra; Edelman v. Lee Optical Co., supra.*

2. The Appellate Court's Opinion Concluding (i) Insufficient Evidence Of Contract And Entering Judgment NOV On That Basis And (ii) That The Jury Verdict In Favor Of Landers "Was Against The Manifest Weight Of The Evidence" Deprived Landers Of Its Right To A Jury Trial Guaranteed Inviolate By The Illinois Constitution (1970) Article 1 §13 And Thereby Deprived Landers Of The Necessarily Inconsistent Verdict Relative To The Verdict

---

[5] The Appellate Court suggested it at page 5 of its opinion that the bank may have made an argument in its brief before that court to the effect that there was not sufficient evidence "for a jury determination of the fact issue relating to the contract count (of Landers' counter-complaint)". That is simply not accurate. The closest the bank came in its brief to saying anything remotely along those lines is the last clause of the last sentence in the first full paragraph on page 17 of its brief where the bank said "and the bank never did anything to indicate or otherwise imply that it was not going to enforce the promissory note according to its terms." However, assuming that is the argument to which the Appellate Court was alluding in its opinion, that argument was never made in the bank's post-trial motion and therefore was not properly before that court on appeal.

In Favor Of The Bank On The Promissory Note, Which Inconsistency Required A New Trial.

The Illinois constitution (1970) Article I, §13 provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." According to the innumerable cases which have construed that provision, it means that the right of trial by jury as it existed at common law and which was enjoyed at the adoption of the several constitutions in Illinois shall remain inviolate. See example *Zurich Insurance v. Raymark Industries*, 118 Ill.2d 23, 57, (1987) *Stevens v. Kasten*, 383 Ill. 127, 48 N.E.2d 508; (1943) *Cobin v. Illinois Pollution Control Board* 56 Ill.2d 582, 401 N.E.2d 1390; (1974) *People v. Woerly* 50 Ill.2d 327, 278 N.E.2d 787; (1917). An action on a contract, including a promissory note seeking damages is an action which existed at common law in which the right to trial by jury has historically been emjoyed. *Baber v. Rardin Grain Co.*, 6 Ill.App. 63, 126 N.E.2d 529 (1955); *Construction Aggregates Corp. v. Hewitt Robins, Inc.*, 404 F.2d 505, 509 (7th Cir. 1968), citing *Rankin v. Fidelity Ins.*, 189 U.S. 242, 252-53; 3 Corbin on Contracts (1964) §554 at Pages 226-227; *Meyers v. Selznick Co.*, 373 F.2d 218, 223 (2nd Cir. 1966).

This Court and the Illinois legislature have prescribed in Supreme Court Rule 366(b)(2)(iii) and Code of Civil Procedures §2-1202(a) and (b) the means by which a jury verdict may be taken away from a litigant. Rule 366(b)(2)(iii) provides that in jury cases "a party may not urge as error on review of the ruling on his post-trial motion any point, ground, or relief not specified in the motion." Code of Civil Procedure §2-1202(a) prescribes that in the event a party has moved for a directed verdict of close of the evidence before the case has been submitted to the jury, that motion "is waived unless the request is renewed in the post-trial motion." A motion for directed verdict preserved in a post-trial motion is then gauged by the standard articulated by this court in *Pedrick v. Peoria and Eastern RR Company*, 37 Ill.2d 494 (1967). That standard is that a judg-

ment NOV can be "entered only in those cases in which all the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the moving party that no contrary verdict based on that evidence could ever stand." *Pedrick, supra*, 37 Ill.2d 494 at 510.

Additionally, Code of Civil Procedure §2-1202(b) provides that "the post-trial motion contain the points relied upon, particularly specifying the grounds in support thereof and must state the relief desired, as for example, the entry of judgment, the granting of a new trial, or other appropriate relief". This court has conclusively interpreted that provision in *Brown v. Decatur Memirial Hospital*, 83 Ill.2d 344 (1980), as follows:

> the purpose of the post-trial motion specificity rule is three fold. First, it allows the decision maker who is most familar with the events of the trial, the trial judge, to review his decisions without the pressure of an ongoing trial and to grant a new trial if, on reconsideration, he concludes that his earlier decision was incorrect. (Citing cases). Second, by requiring the statement of the specific grounds urged as support for the claim of error, the rule allows a reviewing court to ascertain from the record whether the trial court has been afforded an adequate opportunity to reassess the allegedly erroneous rulings. Third, by requiring the litigants to state the specific grounds in support of their contentions, it prevents them from stating mere general objections and subsequently raising on appeal arguments which the trial judge was never given an opportunity to consider. (Citing cases). The rule, which is not limited to questions concerning jury instructions, has the salutary effect of promoting both the accuracy of decision making and the elimination of unnecessary appeals.

83 Ill.2d 344 at 349-50.

In this case, no motion for directed verdict was made and preserved in compliance with the foregoing provisions to the ef-

fect that the evidence was insufficient as a matter of law to support a finding of a contract. No motion was made and preserved in compliance with the foregoing provisions to the effect that the jury verdict in favor of Landers was against the manifest weight of the evidence. Therefore, the Appellate Court in adjudicating those issues adversely to Landers after a jury had found in Landers' favor, deprived Landers its verdict in derogation of the prescribed procedures. The Appellate Court, therefore, deprived Landers its Illinois Constitutional right to a jury trial.

By depriving Landers its Illinois Constitutional right to a jury trial as herein described, the Appellate Court also deprived Landers the right to have that verdict in its favor on the breach of contract claim be considered in light of the verdict in favor of the bank on the promissory note. The bank's verdict on the note was returned in the face of Landers' affirmative defense of waiver to the bank's claim. The two verdict are necessarily inconsistent in that the elements of Landers' defense of waiver to the promissory note were the same as the elements of its claim for breach of contract, except that with respect to the latter, Landers had to prove consideration.

The general rule is that "a verdict is bad and will not support a judgment where it is inconsistent, contradictory, repugnant, or illogical", CJS Trial §496; *Moore v. Jewel Tea Co.*, 46 Ill.2d 288, 263 N.E.2d 103 (190); *Martin v. McCarry*, 2 Ill.App.3d 650, 275 N.E.2d 97 (4th Dist. 1971); *Manders v. Pulice*, 44 Ill.2d 511, 256 N.E.2d 330 (1970); *Western Springs Park District v. Lawrence*, 343 Ill. 302, 175 N.E. 579 (1931); *Marotta v. General Motors Corp.*, 108 Ill.2d 168 (1985); *Pease v. Ace Hardware Home Center*, 147 Ill.App.3d 546, 559 (2d Dist. 1980).

The First Appellate District's opinion in *Stewart v. Huff*, 14 Ill.App.3d 782, 303 N.E.2d 641 (1st Dist. 1973), stands virtually on all fours with the instant case. In *Stewart*, the defendant, a lawyer, was employed as general counsel for First Federal Savings and Loan of Chicago. The plaintiff had become ac-

quainted with defendant inJune, 1958. She discussed with him the possibility of her buying as an investment the mortgages on two pieces of property which were held by First Federal. The defendant advised the plaintiff that the mortgages were in default and that he was in a position to obtain them for her. He further advised, however, that before either property went to foreclosure, First Federal would have to give its approval and before she could buy either mortgage and foreclose herself, the sale would have to be approved by First Federal's board of directors. He also advised her of the owner's right to redeem in the event of a foreclosure and that if there was redemption, she would receive her money plus 6§.

In November of 1958, the plaintiff gave the defendant $10,470.95 for the purpose of obtaining the mortgage on one of the properties. In June of 1959, the plaintiff gave the defendant an additional $1,300 to obtain the mortgage on the other property bringing the total sum she placed with the defendant to $$1,770.95.

However, the defendant was unable to obtain the mortgage on either of the properties. Moreover, he failed to inform the plaintiff of this but rather led her to believe that he had obtained the property for her. Additionally, he sent her detailed correspondence including statements of his charges for services rendered in connection with the foreclosure. This deception continued for approximately six months after which the defendant admitted that he has been unable to obtain the properties and offered to return the plaintiff's property to her plus 6% interest for a total of $13,035. The plaintiff refused this offer, maintaining that the defendant had guaranteed that he would obtain the properties for her.

In October, 1960, the plaintiff through her lawyer contacted the defendant. The defendant testified at trial that he met with plaintiff's lawyer in plaintiff's lawyer's office and renewed his offer to return the plaintiff's money plus 6% interest. The plaintiff's lawyer accepted the offer but stated that it would not

be enough to satisfy the plaintiff and that in addition to the $13,035, the defendant would be obliged to pay an additional $10,000 in cash and sign a note for $24,000. The defendant further testified that the plaintiff's lawyer told him that if he did not comply with this demand, the plaintiff would file a complaint with the State's Attorneys office, the directors of First Federal, and the appropriate bar association grievance committees. Because of these threats, the defendant paid an additional $10,000 and further signed a note payable to the plaintiff in the amount of $24,000. That note was the subject of the lawsuit. The note, which was payable in installments, was signed on October 13, 1960. The defendant paid 11 installments of $200 each for a total of $2,200 and then refused to pay further whereupon plaintiff sued.

The defendant answered and counterclaimed. His theory in defense was that the consideration for the note was plaintiff's agreement not to prosecute the defendant and that such consideration was illegal, thus rendering the note unenforceable. This was also the theory of the defendant's counterclaim by which the defendant sought to recover the $10,000 which he had paid to the plaintiff in cash. The jury returned a verdict in favor of the plaintiff on the note amount of $29.512.50. However, the jury also returned a verdict in favor of the defendant on his counterclaim in the amount of $10,000. the trial court entered judgment NOV in favor of the plaintiff. On defendant's appeal, the court held that the verdict on the note was inconsistent with the verdict on the counterclaim. Therefore, it held that the trial court erred when it granted plaintiff's motion for judgment NOV on the counterclaim. the court held that two verdicts, one for the plaintiff, and the other for the defendant were simply inconsistent and contradictory and that a new trial was required.

Stewart would seem to govern the result in the case. That is true because Landers' affirmative defense of waiver to the bank's suit on the note was predicated on the same facts as its counterclaim for breach of contract, with the exception that the

latter included the element of consideration which the former did not. Thus, Landers proved more to establish a breach of contract than it had to prove to establish the affirmative defense of waiver. Therefore, the result in this case should have been the ordering of a new trial.

3. The Appellate Court's Decision Reversing The Judgment In Favor Of Landers On The Grounds "Insufficient Evidence Of Contract" And The Verdict Being "Against The Manifest Weight Of The Evidence" When Those Grounds Had Not Been Advanced In The Circuit Court, Had Not Been Advanced In The Post-Trial Motions, And Had Not Been Briefed Or Argued On Appeal, Deprived Landers Of Due Process Of Law Guaranteed By The Fourteenth Amendment Of The United States Constitution And The Illinois Constitution (1970) Article 1 §2.

The Fourteenth Amendment to the United States Constitution provides in relevant part that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law. . . ." Property rights in turn "are created and their dimensions are defined by existing rules or inderstandings that stem from an independent source such as state law . . .", *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972).

Roth, the seminal case in this area, stands for the further proposition that

> to have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. 564, 577, 33 L.Ed.2d 548.

The Seventh Circuit has recently construed a "legitimate claim of entitlement" as existing "when the statutes or regulations in question establish a framework of factual conditions

delimiting entitlements which are capable of being explored at a due process hearing". *Edison v. Pierce*, 74 F.2d 453, 459-60 (7th Cir. 1984). More recently, the Seventh Circuit said "where state law gives people a benefit and creates a system of non-discretionary rules governing recocation or renewal of that benefit, the recipients have a secure and durable property right, a legitimate claim of entitlement." *Cornelius v. LaCroix*, 838 F.2d 207, 210 (7th Cir. 1988).

As demonstrated in the preceding section of this petition, the Illinois Constitution of 1970 Article 1 §13 creates and case law construing it defines the right to trial by jury which litigants before the courts of the state of Illinois such as Landers Seed Company, Inc. possess. That right exists in a contract case such as the case at bar. *Zurich Insurance v. Raymark Industries.* 118 Ill.2d 23, 57; (1970), 3 Corbin on Contracts (1964) §554 pages 226-227; *Construction Aggregates Corp. v. Hewlitt Robins, Inc.*, 404 F.2d 505, 509 (7th Cir. 1968); *Rankin v. fidelity Ins.*, 189 U.S. 242, 252-53. Moreover, as set forth in the preceding section, the right to trial by jury may be taken away in conformity with the Code of Civil Procedure §2-1202(a) and (b) and Supreme Court Rule 366(b)(2)(iii). *Pedrick v. Peoria & Eastern R.R. Co., supra.* Those procedures were not followed in this case. Landers, therefore, had a legitimate claim of entitlement to a jury trial and the jury verdict in its favor. *Cornelius v. LaCroix, supra.*

Once a property interest or a legitimate claim of entitlement is found to exist, "the due process clause provides that (it) can not be deprived except pursuant to constitutionally adequate procedures." *Cleveland Board od Education v. Loudermill et al*, 470 U.S. 532, 84 L.Ed.2d 494, 503 (1985). "The right of due process is conferred, not by legislative grace, but by (federal) constitutional guarantee." *Id.*

"Once it is determined that the due process clause applies, the question remains what process is due." *Morrisay v. Brewer*,

408 U.S. 471, 481 (1972). See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982). It has long been held that the essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L.Ed. 865, 70 S.Ct. 652 (1950). The United States Supreme Court in *Peralta v. Heights Medical Center, Inc.*, 56 LW 4189 (Feb. 24, 1988), held that a Texas requirement that a defendant against whom a default judgment had been entered without notice present a meritious defense in order to secure relief from that default judgment violated to due process clause. In so holding, the Supreme Court said "it is no answer to say that in (a particular case) due process of law would have led to the same result because (a defendant) had no adequate defense upon the merits." 56 LW 4189, 4191, citing *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915). Rather, the Court held that "only" 'wiping the slate clean would have restored the petitioner to the position he would have occupied had due process of law been accorded in the first place.' " 56 LW at 4191, citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In the instant case, as has hereinabove been demonstrated, the Appellate Court adjudicated issues as to the sufficiency of the evidence to support the existence of a contract and the sufficiency of the evidence in support of the jury verdict finding that the Plaintiff bank breached the contract the jury had necessarily found to exist. In so doing, the Appellate Court adjudicated issues which had never been ruled upon by the trial court. Those issues were not briefed or argued in the Appellate Court. The Appellate Court, therefore, exceeded its appellate jurisdiction. Additionally, in so doing, the Appellate Court exceeded its scope of review under *Ill. Rev. Stat.* Chapter 110A §366(b)(2)(iii).

Consequently, the Appellate Court has necessarily adjudicated issues which had never before been vrought to the at-

tention of Landers in that they had never been raised in the trial court, never presented in the post-trial motion and not briefed on appeal in the Appellate Court whereby Landers could have responded. Moreover, the bank at argument properly conceded there was sufficient evidence of contract. Therefore, Landers had no notice and no opportunity to be heard on the question as to whether or not the evidence was sufficient to show the existence of a contract. *Mullane v. Central Hanover Bank & Trust Co. supra.* Landers had no notice or opportunity to be heard on whether or not the evidence was sufficient to sustain the jury verdict in favor of Landers that the bank breached the contract which the jury necessarily found to have existed. *Id.*

Had there been compliance with the provisions of *Ill. Rev. Stat.* Chapter 110 §1202(b) and *Ill. Rev. Stat.* Chapter 110A §366(b)(2)(iii) respecting issues going to the sufficiency of the evidence to support the existence of a contract and the sufficiency of the jury verdict finding that the bank breached the contract, Landers, of course, would have had notice and an opportunity to respond. Moreover, even failing compliance with §2-1202(b) and Supreme court Rule 366(b)(2)(iii), had the issues of the sufficiency of the evidence going to the existence of the contract and to the jury verdict finding a breach of that conract by the bank been briefed by the bank in the Appellate Court, Landers probably would have had, for federal due process purposes, adequate notice and an opportunity to be heard. However, in availing itself of that opportunity to be heard, Landers undoubtedly would have taken the position that those issues were not properly before the Appellate Court as not having been preserved.

Therefore, based on what the record in this case shows without equivocation, Landers had no notice at any point in the proceedings herein prior to the Appellate Court's announcement of its decision on January 21, 1988 that there existed any question as to the sufficiency of the evidence as to the existence of a contract between it and the bank. Moreover, at no point in

the proceedings prior to the Appellate Court's announcement of its decision on January 21, 1988 did Landers have any notice that the sufficiency of the evidence to sustain the jury verdict that the bank had breached that contract was in question. By not having any notice of either of the foregoing, Landers obviously had no opportunity to respond and attempt to rebut the arguments which the Appellate Court sua sponte made in its January 21, 1988 opinion.

In taking Landers' jury verdict away from it without having the constitutional jurisdiction to do so and further in violation of the Supreme Court Rules, the Appellate Court thereby deprived Landers of the property right to trial by jury created by Illinois Constitution (1970) Article I, §13. It deprived Landers of the benefits of the jury verdict in its favor. Moreover, the Appellate Court deprived Landers the right to have that verdict in its favor viewed in light of the contrary verdict in favor of the bank on its complaint on the promissory note. Those verdicts were necessarily inconsistent thereby entitling the parties to a new trial. See *Stewart v. Huff, supra.*

Therefore, Landers' federally protected property right created by Illinois law to trial by jury has been denied Landers by the Appellate Court without any notice and without an opportunity to be heard on the issue. Landers has therefore been denied its property right created by Illinois law to trial by jury without any process, let alone due process of law as contemplated by the Fourteenth Amendment to the United States Constitution and Article I §2 of the Illinois Constitution of 1970.

b. Leave to Appeal as a Matter of Sound Judicial Discretion

1. The Appellate Court Had No Authority Under Supreme Court Rule 366(b)(2)(iii) To Conclude (i) There Was "Insufficient Evidence Of Contract And (ii) The Jury Verdict In Favor Of Landers On Its Breach Of Contract Claim

"Was Against The Manifest Weight Of The Evidence" As Those Issues Were Not Raised At Any Time In The Circuit Court Including In The Bank's Post-Trial Motion, Were Not Ruled Upon By The Circuit Court, And Were Not Briefed Or Argued On Appeal; This Case Raises An Important Question Respecting The Integrity Of The Appellate Decision Making Process Requiring The Exercise By This Court Of Its Supervisory Authority.

As argued in the preceding section, Supreme Court Rule 366(b)(2)(iii) and *Ill. Rev. Stat.* Chapter 110 §2-1202(a) and (b), and this Court's decision in *Brown v. Decatur Memorial Hospital, supra*, 83 Ill.2d 344 (1980), prescribe the means and value of preserving issues in jury cases for Appellate review. In addition, this court in *People v. Caballero*, 102 Ill.2d 23 (1984), discussed the applicability of the rules relating to the post-trial motion in criminal cases, stating that in fact "(if) prescribed procedures are followed, needless time spent in briefing, arguing and considering countless superficial errors can be saved." 102 Ill.2d 32. Moreover, this Court said in *Caballero* "that failure to raise issues in the trial court denies that court the opportunity to grant a new trial, if warranted." *Id.* at 31.

As stated above, the only arguments made by the bank in its post-trial motion were that the circuit court erred in admitting parol evidence as to the oral agreement, that the damage evidence was too remote and speculative to sustain the $60,833.31 verdict, and that the circuit court erred in giving Landers' Instruction No. 23 relating to damages. Those were the only questions ruled upon by the circuit court in response to the bank's post-trial motion.[6] Moreover, as evidenced by the

---

[6] It seems the only way the Court could have jurisdictionally reached the result it reached in this case would have been to conclude that the bank was correct in its parol evidence argument. However, to reach that result, the appellate court would have to discount the customary law relative to the parol evidence rule as set forth in Landers' Reply Brief in Appellate Court, Pages 3-8.

bank's brief in the appellate court, those were the only arguments raised by the bank in that court. Additionally, the bank's counsel at argument in the appellate court admitted that there was sufficient evidence before the jury from which the jury could have concluded that there was a contract between the bank and Landers. Slip Opinion p. 5.

But, what is at stake in this case is more than simply a failure to honor *Ill. Rev. Stat.* Chapter 110 §2-1202(a) and (b), and Supreme Court Rule 366(b)(2)(iii) for the purpose of giving the trial judge the opportunity to grant a new trial if warranted. *People v. Caballero, supra*, at 31. What is at stake is the integrity of the appellate decision making process. Not only did the trial court not have an opportunity to rule on the question of whether or not the evidence in support of the contract Landers' pleaded and proved was sufficient, Landers had no opportunity to respond to any suggestions that it was not.

Aside from the due process considerations which are raised, the rationality and correctness of the Appellate decision making process are at stake. The appellate court's opinion arguing that there was insufficient evidence of contract and its decision that the jury's verdict in favor of Landers was against the manifest weight of the evidence were simply not tested at any time by the adversary process itself. Thus, in the now accepted due process formulation articulated by the United States Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319, the failure to abide by the procedures required by the rules of this Court and the Illinois Legislature respecting the preservation of issues for review on

---

Also, if the Court were to have concluded that the bank was correct respecting its famage argument which was preserved in its post-trial motion, that would mean only that the verdict as to the amount of damages could be set aside, in which case as Landers' Instruction No. 23 specifically provided, the jury would have been entitled to enter a nominal verdict. However, that would leave intact the jury's finding as a matter of fact the existence of the contract and the breach thereof by the bank.

appeal in jury cases creates a risk of an erroneous deprivation of the interests of the litigants.

It certainly cannot be denied in this case that the failure of the Appellate Court to require adherence to the dictates of the Supreme Court Rules and the Code of Civil Procedure respecting appeals has subjected Landers to the deprivation of the benefit of the jury verdict in its favor. This deprivation occurred without Landers having had the opportunity to address the concerns articulated by the appellate court. Not only is that not fair, it is not in accord with the procedures which have been established in this jurisdiction to insure the integrity and the rationality of the appellate decision making process.

This court's exercise of its supervisory authority is, therefore, required to ensure that the result in this and future cases decided by the Appellate Courts of the State adhere to the procedures set forth in the Code of Civil Procedure and the Supreme Court Rules. Such adherence in turn would give confidence to both litigant and the courts alike that the pronouncements made by the Appellate Court are the product of procedures designed to ensure just and correct results.

2. Even If The Appellate Court Had The Authority To Conclude The Verdict In Favor Of Landers Was "Against The Manifet Weight Of the Evidence, Which It Did Not, The Remedy Was To Order A New Trial, Not To Enter Judgment NOV.

Ill. Rev Stat. Chapter 110 §2-1202(b) permits a party after a jury trial case to seek either judgment NOV or a new trial. The rule established in *Pedrick v. Peoria and Eastern Rail Road Co.*, 37 Ill.2d 494 (1967) is that a judgment NOV can be "entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the moving party at no contrary verdict based on that evidence could ever stand." *Pedrick, supra*, 37 Ill.2d 494 at 510.

However, assuming the issue of sufficiency of evidence has been preserved, when an appellate court, as the Appellate Court did in this case, concludes that the jury verdict is against the manifest weight of the evidence, the remedy is a new trial. *Corcoran v. City of Chicago* 373 Ill. 567, 27 N.E.2d 451 (1940); *Mizowek V. DeFranco*, 64 Ill.2d 303, 310 (1976); *Pedrick v. Peoria and Eastern Rail Road Co.*, 37 Ill.2d 494 (1967); *Heuer v. Goldberg*, 106 Ill.App.2d 555, 61 (1st Dist. 1969); *Spankroy v. Alesky*, 45 Ill.App.3d 979, 460 N.E.2d 1097. See also for e.g. *Sneeden v. Levenka*, 92 Ill.App.3d 979, 460 N.E.2d 1097. There is no authority for a court under a standard less than that enunciated by the Court in *Pedrick, supra* being empowered to enter judgment NOV. It may do so under *Pedrick* only when the issues has been properly preserved.

3. The Appellate Court's Conclusions Of "Insufficient Evidence Of Contract" And The Jury Verdict For Landers Being "Against The Manifest Weight Of The Evidence" Conflict With This Court's Opinions In *Steinberg v. Chicago Medical School*, 69 Ill.2d 320 (1977) and *Midland Hotel v. R.H. Donnelley Corp.*, 118 Ill.2d 306 (1987), Thereby Requiring The Exercise Of This Court's Supervisory Authority To Reconcile That Conflict.

A. Agreement to do a "Particular Thing"

This Court held in *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 329 (1977), that "a contract by ancient definition , is 'an agreement between competent parties upon consideration sufficient in law, to do or not to do a particular thing,' " quoting *People v. Dummer*, 274 Ill. 637, 640 (1916). That formulation is in accord with the *Restatement's* position, *Restatement 2d of Contracts* §17, saying "formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." In Comment b to §17, the *Restatement* provides that "the typical contract is a bargain and is binding without regard to form."

The *Steinberg, supra* formulation and in essence the *Restatement* formulation were applied several months ago by this Court in *Midland Hotel v. R.H. Donnelley Corp.*, 118 Ill.2d 306 (1987). In *Midland Hotel*, this court held that a contract which required a promisor to provide "appropriate listings" for a hotel company in the yellow pages of a telephone directory was sufficiently definite to constitute an agreement between the parties. In so holding, this Court said "in order for there to be a contract between parties there must be a meeting of the minds or a mutual assent as to the terms of the contract; however, it is not necessary that the parties share the same subjective understandings as to the terms of the contract." 118 Ill.2d at 313. Rather, this Court said "it suffices that the conduct of the contracting party indicates an agreement to the terms of the alleged contract," *Id.*, quoting *Steinberg v. Chicago Medical School, supra*, at 331.

In the case now before this court, the Appellate Court in its opinion at Pages 1, 3, 5, 7 and 8 construed the agreement pleaded and proved by Landers as one to "borrow money in the future." That characterization, however, is simply inaccurate. The agreement pleaded and proved by Landers was one whereby on August 23, 1982, the Champaign National Bank agreed to forebear collecting an indebtedness which was existing and outstanding as of that date and participated to it by the First National Bank of Sullivan, Illinois. In consideration of that agreement, Landers agreed to enter into a direct relationship with the Champaign National Bank by executing promissory notes in its favor and not in favor of Sullivan. Champaign's agreement to forebear was conditioned upon Landers making reasonable progress toward "profitability", a period of which could take up to three (3) years. Paragraphs 1 and 2 of Count I of Landers' Counterclaim, C-130-137; Landers' tendered instructions on waiver and breach of contract, C-618; 622-624; 627, 629-630; Reporter's Transcript 591-600; and C-629-630 make this clear. Landers' Brief at Pages 9 and 10 in the Appellate Court further makes this clear.

The testimony of Lee O'Neill under cross-examination at Transcript Pages 439-440 and 443-445 is explicit in the foregoing respect:

Question: In fact, Mr. O'Neill, you stated that the bank was interested in working with the company as long as the company was making a direction toward improving the situation and as long as there was a chance that the company was going to be able to return to profitability, you said that 'didn't you'?

Answer: I don't remember making that specific statement, no.

Question: All right, Mr. O'Neill, but I bet you do recall giving (a) deposition in this case in February, 1984, right?

Answer: Yes.

Question: Do you remember this question:

Q: Do you recall Charles Landers asking any questions or expressing any concern as to whether or not the bank intended closing (Landers) down?

A: At that point the discussion was as long as the, in answering that type of question, again I don't remember who asked it, the response that I gave was that the bank was interested in working with the company as long as it was making a direction toward improving the situation and as long as there was a chance that the company was going to be able to return to profitability.

Q: You said that?

A: "Yes."

Question: Do you remember that?

Answer: Yes. That was my statement, yes.

T-439-440.

It was then established through O'Neill that the bank required that Landers give monthly statements, pay interest on the notes as they became due and reduce principal as conditions of the bank continuing to work with Landers. By the time the note which was executed by Landers in favor of the Champaign National Bank on August 23, 1981 for 120 days became due on December 21, 1982, that note was renewed pursuant to the understanding between the bank and Landers. The following testimony of O'Neill is instructive in that respect and respecting the reduction of principal:

Question: The first note, the August 23, 1982 note, the interest was indeed paid, is that not correct?

Answer: That is correct.

Question: That note was renewed, is that not correct?

Answer: That's correct.

Question: That was your understanding, is that not correct?

Answer: That (it) would be renewed, yes, assuming the interest was paid.

Question: And a new note was signed, that's part of what the renewal is, isn't that right, the new note of June — pardon me, of

December 21 was signed after, as the renewal of the August 23 note, isn't that right?

Answer: Correct.

Question: There was some specification by you on August 23 that that there be a reduction in principal on the note, isn't that right?

Answer: Yes.

Question: But there was no prescribed schedule for reducing the principal, was there?

Answer: Specific dollar amount, no.

Question: Nor time amount either, was there, Mr. O'Neill?

Answer: The note was written for a 120 day term. That was the time of the note.

Question: There was no prescribed schedule for reduction of principal, was there, Mr. O'Neill?

MR. EVANS: I want to object to the question, Your Honor. He has answered it. In a technical sense the reduction in principal, the whole principal amount was due on December 21st when the whole thing came due.

MR. BISBEE: I am not asking about the technical terms on the face of the note. He already said he was ging to renew the note.

THE COURT: The question was whether there was a schedule for repayment, is that right?

MR. BISBEE: That's right.

THE COURT: Overruled. He may answer.

Answer: No, there was no schedule, except that the —

Question: No question.

Answer: Can I answer the question?

MR. EVANS: Your Honor, he is entitled to give his answer. It may not be what Mr. Bisbee wants to hear, but he is entitled to give it.

MR. BISBEE: The question was whether there was a prescribed schedule for reduction of principal. That was one of the conditions he made in his deal and he said no, there was no prescribed schedule for reduction of principal.

MR. EVANS: He said except and he is entitled to finish his answer.

THE COURT: I think you are going to have to bring that out on your redirect. He has answered it when he said no.

T-443-445. There was no redirect examination of O'Neill. T-466

At no time did Landers ever claim that the bank agreed to lend money in the future. The bank never at trial or before the Appellate Court suggested that the nature of the contract was other than one for forebearance.

In its Opinion at page 5, the Appellate Court suggested that "an agreement to continue to refinance or roll over a debt appears similar to an oral contract to lend money in the future." Upon what factual or legal bases the Appellate Court made this

statement is not clear. However, the fact of the matter is that in the instant case, there was no agreement alleged or attempted to be proved whereby Landers said that the bank agreed to lend money in the future.

After misstating the nature of the contract proved by Landers, the Appellate Court then said what was proved was "indefinite." Slip p. 9. It based its holding in that respect on the First District's language in *McErlean v. Union National Bank,* 90 Ill.App.3d 141 (1980), and the Appellate Court's recent opinion in *McClellan v. Banc Midwest* (December 31, 1987, 4th Dist. Gen. No. 4-87-0305) (No. 66655 in this Court on Petition for Leave to Appeal). For example, the Appellate Court asked rhetorically respecting the "progress toward profitability" condition of the bank's agreement to forebear for the period up to three (3) years, "who is to be the judge of that progress?".

As this court is aware, the implied covenant of good faith and fair dealing governs the operation of contracts in Illinois. *Martindell v. Lake Shore National Bank,* 15 Ill.2d 272 (1958); *Foster Enterprises v. Germania Federal Savings & Loan Assoc.,* 97 Ill.App.3d 22 (3d Dist. 1981); *Carrico v. Delp,* 141 Ill.App.3d 684, 689-90 (4th Dist. 1986); *Restatement 2d of Contracts* §205 (1981). In that respect, the law is that "good faith between contracting parties requires that a party vested with contractual discretion must exercise its discretion reasonably and may not do so arbitrarily or capriciously." *Foster Enterprises v. Germania, supra,* 97 Ill.App.3d 22 at 30. The bank obviously had the power to exercise discretion as to whether or not Landers was making sufficient progress toward profitability. It was required to exercise that discretion in good faith. *Foster Enterprises v. Germania, supra; Restatement 2d Contracts* §205 (1981).

The evidence in the case showed that ten months after the August 23, 1982 agreement was entered into, Landers was showing progress from a loss of $854,492 for the fiscal year ending

June 30, 1983 to either an $800 profit or a $73,000 loss for the fiscal year to end June 30, 1984. Either one of those projections according to the testimony of Landers' CPA was a reasonable forecast. Either one, under any conceptualization of the "progress toward profitability" condition, would reasonably require one to say that progress toward profitability had been made. Lee O'Neill in his testimony specifically admitted that fact as follows:

Question: Mr. O'Neill, any way you cut it, let's talk about the $73,000 loss, that's an improvement, is it not, sir, over the $350,000 loss? Isn't that right?

Answer: Yes.

Question: And that $800 profit is an even better improvement, is it not?

Answer: It is but you also have to look at the balance sheet of the corporation.

Reporter's Transcript Page 456-457. O'Neill further testified that he had no doubts about Nick Piraino's credentials or abilities as a CPA. Transcript Page 457. Piraino testified that either one of those projections was reasonable. Transcript 252, 253, 266.

In its opinion at Page 7, the Appellate Court further faulted the contract proved by saying that "(n)o cost of money terms were included in the alleged agreement; no terms exist as to additional capital advanced or duration of loans; maturity dates were not provided; mode or rate or repayment was not contemplated." However, those elements simply have no bearing on an agreement to forebear collecting an existing outstanding indebtedness. There were to be no additional capital advances. The duration of the forebearance was up to three years. The mode of repayment was payment of interest every 120 days. Repayment on principal was to begin either when the company at-

tained profitabilty or upon the expiration of three years, whichever occurred first. Moreover, there was to be some reduction in the principal balance pursuant to unspecified schedule during the three year period. This Landers more than did. Defendant's Exhibits 6 through 9 inclusive; Transcript 18, 217-225; 463-466; Landers' Brief Page 11.

The bank nowhere disputed any of those elements except the three year duration of the bank's agreement to forebear. But, the bank did not raise any dispute it had in that respect in its post-trial motion.

Therefore, under the formulation of this Court in *Steinberg v. Chicago Medical, supra,* and *Midland Hotel v. R.H. Donnelley Corp., supra,* Landers did prove and the jury did accept that the parties agreed to do a particular thing, namely forebear collecting an outstanding indebtedness so long as Landers show progress toward profitability, paid interest and made reports.

B. Sufficient Consideration

As held by this Court in *Steinberg v. Chicago Medical School, supra,* an agreement to do a particular thing is enforceable only if it is supported by sufficient consideration. In this case Landers pleaded, proved and the jury accepted that the consideration for the bank's agreement to forebear collecting on the outstanding indebtedness for a period of up to three years was Landers' agreement to enter into a direct relationship with the bank and execute promissory notes in the bank's favor representing that outstanding indebtedness. However, the appellate court made the incredible argument in its opinion that Landers gave up nothing by entering into the direct relationship with the Champaign National Bank on August 23, 1982 and, therefore, there was no consideration for the bank's agreement to forebear collecting on the notes. The Appellate Court's theory in this respect was that "the argument that Plaintiff (Champaign National Bank) did not have effective remedies (pursuant to the participation agreements) against Defendant

and guarantys prior to August 23, 1982 is not established by the evidence and is without merit." Appellate Court Opinion Page 9.

What is amazing about that statement is that at no time throughout the entirety of the instant litigation had there ever been any question about the fact that prior to August 23, 1982 the Champaign National Bank had no rights against the Landers. This was the case because the only rights Champaign had were established by the participation agreements between it and the First National Bank of Sullivan, the Sullivan Bank being the initiating bank. The Trial Transcript at Pages 24 through 29, 31, 34, 40, 352, and 421-423, is unequivocal and explicit to the effect that it was the Champaign Bank's desire to end the participation arrangement and enter into the direct relationship with Landers because it perceived that it had no rights against Landers under the participation agreements. It was also concerned about the possibly deteriorating financial condition of Landers. The bank's own brief before the Appellate Court at Page 4, Paragraph No. 7 specified the desire of Champaign National Bank to restructure the loan that existed prior to August 23, 1982 so as to create a direct relationship. No hint to the contrary existed anywhere in the record before the Appellate Court.

But, in support of its conclusion that somehow the Champaign Bank had rights against Landers prior to August 23, 1983 and that therefore Landers gave up nothing by entering into the direct relationship, the Appellate Court said at Page 9 that "the only evidence that the participation agreement between First National Bank of Sullivan and Champaign National Bank is Defendants' Exhibit No. 12, which is a certificte of participation dated October 8, 1981 . . . (relating) to a $120,000 payment of Champaign National Bank's participation to a loan of $120,000 made to Landers Seed Co. evidenced by a note dated October 8, 1981." However, that conclusion is simply belied by the evidence. The testimony is explicit at Transcript Pages 24, 25, 29, and 31 that Exhibit No. 12 was simply a facsimile show-

ing the nature of the participation relationship between the First National Bank of Sullivan and the Champaign National Bank. The particular reference to a specific loan in that exhibit had no bearing in this case. Rather it is the format and the boiler plate language of the exhibit which indicate the nature of the participation relationship between the Champaign and the Sullivan banks.

For example, at the transcript Page 24 Landers' counsel in questioning Jan Haegen, the former officer of the First National Bank of Sullivan responsible for creating the participation relationship with the Champaign National Bank, elicited the following testimony:

Question: That Exhibit 12 does not purport to be, Mr. Haegen, the entirety of the Landers Seed Co. business that you dealt to Champaign National Bank?

Answer: No it does not.

Question: It says here it is dated October 8, 1981, you are familiar with this basic controversy, are you not?

Answer: Yes.

Question: This date does not have anything to do with this controversy, does it?

Answer: No it does not.

Question: *This form basically just sets forth the form that you used in dealing with Champaign National Bank, does it not?*

Answer: *That is correct, right.*

Question: Are the terms in this form similar to all other participation agreements that you

use with Champaign National Bank in relation to the Landers' account?

Answer: Yes, they are.

Transcript Pages 24, 25. [Emphasis supplied]. Further, the following colloquy occurred:

Mr. Bisbee: I would move for the admission of Exhibit 1 (meaning 12).

The Court: Has it been previously admitted?

Mr. Bisbee: I guess it was. 12, pardon me, I am sorry. Exhibit 12 which is the —

Mr. Evans: *Facsimile.* I have no objection.

The Court: Defendants' 12 admitted, no objection.

Transcript Page 29. [Emphasis supplied]. Additionally the following occurred:

Question: (By Mr. Evans on belf of Champaign National Bank) Did you have essentially the same relationship with them insofar as the participation certificate is concerned that you had with Champaign National Bank?

Answer: I believe so.

Question: Whose, going back to the facsimile (Defendant's Exhibit 12), the one dated in 1981, Mr. Haegen, whose document is that? Is that yours or does the bank you are farming the loan off to, do they provide that document?

Answer: On this case we provided the document.

Question: Would you please take another look, if you would, at that document which has

been marked Certificate of Participation and is Defendant's Exhibit 12, so that's a document that you would have either provided or prepared in house, completed and then shipped out to the bank that was buying participation from you, is that correct?

Answer: That is correct.

Transcript Pages 30-31.

Under this participation agreement, the Sullivan Bank was the one reposed with the complete discretion to attempt to collect or not to collect as it so chose. Landers Exhibit 12. The Champaign Bank was aware of that as evidenced by the testimony of Lee O'Neill set out below. Because it was aware of that, it undertook to establish the direct relationship with Landers because it was concerned about the condition of the credit and it did not want to be dependent upon whatever management decisions the First National Bank of Sullivan made respecting collection. At Page 352 of the Transcript, under questioning by the bank's counsel, O'Neill testified as follows:

Question: Would you please tell us how it happened that you became involved with the corporation on that date (meaning August 23, 1982)?

Answer: While I was on vacation, Steve Vandenberg had had two meetings with the Landers and based on those meetings, — the — *Steve and the management of the bank determined that it was necessary to take the credit previously from a participation of the First National Bank to a direct obligation to Champaign National Bank.*

Furthermore:

Question: (By Mr. Evans) What did you say when you commenced the meeting?

Answer: I indicated that the previous relationship in the form of the participating being purchased was no longer acceptable to the Champaign National Bank *in that it was necessary for us at that time (to) develop a direct loan relationship with the Landers corporation.*

T-352. [Emphasis supplied]. O'Neill later testified under cross-examination:

Question: Prior to August 23, 1982, the only rights that Champaign National Bank had were against the First National Bank of Sullivan, isn't that right?

Answer: Unless we bought the notes.

T-422.

The Appellate's Court's conclusion, therefore, that the record did not establish that Champaign did not have effective remedies against Landers prior to August 23, 1982 is absolutely erroneous and has no support in the record. Moreover, the Appellate Court misapprehended its authority by even suggesting that Landers had the burden to establish that the Champaign Bank had no rights against it when that has never even been a contested issue in this case raised by the parties or ruled upon by the circuit court. Illinois Constitution Article (1970) Article VI, §6; *Sprague v. Goodrich, supra*; *Chicago Board of Education v. Chicago Teachers Union, supra*; *Edelman v. Lee Optical Co., supra*; *Ill.Rev.Stat.* Chapter 110A §366(b)(2)(iii).

Moreover, even if Champaign did have rights of which it was totally unaware against Landers, the undisputed fact of the mat-

ter is that the loan agreement pursuant to which the bank brought suit in this case was established on August 23, 1982 at the bank's insistence. On that date, the direct relationship was established with Landers pursuant to which the unequivocal evidence is that Landers agreed to enter into that direct relationship only after it secured the agreement by the bank to forebear collecting on the notes executed pursuant to the creation that direct relationship. Landers did not have to enter into that relationship. But, O'Neill indicated that he did not intend to put Landers out of business; rather that he wanted to "work with the seed company." Transcript 72, 438-440, 443-445. He also said that Champaign National Bank was willing to work with Landers so as to get Landers back to profitability or to get a reasonable chance for profitability. T-71, 439, 440. He indicated, according to Charles Landers, that the seed company's attained profitability could take up to three years. T-71, 154, 327. O'Neill's tone was positive and he showed confidence in Charles Landers. T-327.

Thus, the direct relationship that the Champaign National Bank established with Landers on August 23, 1982 and pursuant to which it was able to create the December 21, 1982 note upon which it brought the instant lawsuit came about only after Landers was told explicitly and was satisfied that the bank was in agreement to work with it and forebear collecting on the indebtedness for a period of up to three years. The bank perceived that it had no rights prior to August 23, 1982 directly against Landers. Landers was not agreeable to permitting the creation of any such direct rights without the bank's agreement to forebear. And the direct relationship and the agreement to forebear came to be on August 23, 1982.

The Appellate Court's conclusion, therefore, respecting the participation agreement and whatever rights Champaign National Bank may have had directly against the Landers prior to August 23, 1982 simply doesn't make any difference. The fact of the matter is Champaign National Bank did not perceive that

it had any such rights and undertook to create the direct relationship that ultimately culminated in the instant lawsuit. The record is unequivocal in that respect. No party disputes it.

CONCLUSION

For the reasons stated above, Petitioner prays this court to grant it an Appeal as of right. Alternatively, Petitioner prays this court for Leave To Appeal. Pursuant those alternative prayers, Petitioner prays the court to reverse and vacate the judgment and opinion of the Appellate Court and remand this case to the Circuit Court for a new trial.

Respectfully Submitted:

LAW OFFICES OF
JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: 309/833-1797

BY: /s/ JOHN H. BISBEE

DATED: April 20, 1988

APPENDIX W

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

No. 66901

THE CHAMPAIGN NATIONAL BANK,
a National Banking Association,
Plaintiff-Respondent,

vs.

LANDERS SEED CO., INC.,
Defendant-Petitioner.

Appeal from the Appellate Court
for the Fourth Judicial District
Case No. 4-87-0460

Appeal from the Circuit Court of the
Sixth Judicial Circuit, Moultrie County
Case No. 84-L-4

Honorable W. B. Kranz
Judge Presiding

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR APPEAL AS A MATTER OF RIGHT

The Defendant-Petitioner Landers Seed Co., Inc., by and through its attorneys, hereby moves this Court to enter an Order granting it leave to file the following as a supplement to its Petition for Appeal as a Matter of Right in the above captioned matter by way of citing and arguing to this Court supplemental authority going to Landers' due process argument. As reason for so moving, Landers states as follows:

1. On or about April 20, 1988, Landers filed its Petition for Appeal as a matter of Right in the above captioned matter and in so doing advanced as one of its arguments that it had been

deprived due process of law by reason of the appellate court's having announced sua sponte on January 21, 1988, that there was "insufficient evidence of contract" and that the jury verdict in Landers' favor "was against the manifest weight of the evidence."

2. Landers has argued that it was denied due process for the reasons that the issues "insufficient evidence of contract" and sufficiency of evidence to sustain jury verdict had never been raised in the circuit court, had never been ruled upon by the circuit court, and had not been briefed or argued on appeal by the bank, the bank indeed conceding at oral argument in the appellate court that there was sufficient evidence for the jury to conclude that there had been a contract, and, therefore, Landers had no notice or opportunity to to respond to the appellate court's arguments in the foregoing respects.

3. On April 19, 1988, unbeknownst to Landers' counsel, the United States Supreme Court decided *Tulsa Professional Collection Services, Inc. v. Pope,* No. 86-1961, published in 56 L.W. 4302 (April 19, 1988), a copy of which Landers' counsel did not receive until sometime during the week of April 26 and did not get a chance to read until May 14, 1988. A copy of *Tulsa Professional Collection Services, Inc. v. Pope,* is attached hereto in its entirety.

4. In *Tulsa Professional Collection Services,* the Supreme Court cofirmed the basic line of decisions cited by Landers in its Petition to this court, beginning with *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) and continuing through *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982), as standing for the proposition that "state action affecting property must generally be accompanied by notification of that action: 'an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them

an opportunity to present their objections,' " *Tulsa Professional Collection Services,* 56 L.W. 4302 at 4304.

5. In addition, *Tulsa Professional Collection Services,* cited *Mullane, supra,* as standing for the proposition that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Tulsa Professional* at 4304.

6. On the basis of the foregoing, the Supreme Court in *Tulsa Professional* held that the appellant's interest in an unsecured and unliquidated claim against an estate for an unpaid bill, albeit intangible, was a property interest protected by the Fourteenth Amendment. *Tulsa Professional* at 56 L.W. 4304.

7. Additionally, the court in *Tulsa Professional* held that while the Fourteenth Amendment protects property interests, it protects them only from a deprivation by state action and that while private use of state sanctioned private remedies or procedures does not necessarily give rise to state action, "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found, citing *Lugar v. Edmonson Oil Company,* 457 U.S. 922 (1982); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969).

8. On the basis of the immediately foregoing, the Court in *Tulsa Professional* held that the involvement of the Oklahoma Probate Court in the claims procedure to be followed by a claimant against an estate is sufficiently intimate as to constitute state action for federal due process purposes.

9. As applied to the instant case, *Tulsa Professional,* is particularly relevant in that it was not the action of the Plaintiff-Respondent Bank that implicated state action resulting in the denial to Landers of its right to trial by jury and the benefits of that right to trial by jury, namely a verdict in its favor on its contract claim, rather it was the appellate court itself which on its own initiative undertook without any notice whatsoever to

Landers, and without any opportunity for Landers to respond to deprive Landers its right to trial by jury conferrd by the state constitution and undertook to extinguish not simply an intangible and incohate contract claim but a full jury verdict giving concrete value to Landers' contract claim against the bank.

10. By allowing this supplement to be filed, this Court would permit itself to be more fully advised in the current state of the law as articulated by the United States Supreme Court relative to due process under the Fourteenth Amendment to the United States Constitution, and accordingly, it would be in the interest of justice were the Court to permit the filing of this supplement to Landers' Petition for Appeal as a Matter of Right in the above captioned matter.

WHEREFORE, Landers prays this Court to enter an Order granting it leave to supplement its Petition for Appeal as a Matter of Right by filing with this Court the appropriate number of this document setting forth the above stated argument in light of the United States Supreme Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope, supra,* for the reasons aforesaid.

Respectfully Submitted:

LAW OFFICES OF
JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: 309/833-1797

BY: /s/ JOHN H. BISBEE

DATED: May 16, 1988